No. 12,531

IN THE

United States Court of Appeals

For the Ninth Circuit

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY (a corporation),
Appellant,

vs.

BERTHA LEE PORTER, as Special Administratrix of the Estate of Charles E. Porter, Deceased,
Appellee.

BRIEF FOR APPELLEE.

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I.

STATEMENT OF FACTS.

On November 1, 1947, Charles E. Porter died from injuries sustained by him as a pedestrian in a crosswalk at Richmond, California, when struck by an automobile negligently driven by Duane R. Claggett on October 31, 1947.

Charles E. Porter left surviving him as his only heirs at law, Bertha Lee Porter, his wife, and his minor children, Charles Earl, Richard and Patricia Sue (hereinafter called Appellee).

On August 22, 1947, Appellant, State Farm Mutual Automobile Insurance Company, a corporation (hereinafter called Insurer), issued its standard service automobile insurance policy to Wilbur Mehlin, whereby it insured such automobile and agreed under Coverage A "To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, because of bodily injury * * * and death at any time resulting therefrom, sustained by any person * * *, caused by accident and arising out of the ownership, operation, maintenance or use of * * *" such automobile* (Transcript, p. 30). It defined the term "Insured" as follows:

> "The unqualified word 'insured' wherever used in Coverage A and in other parts of this policy when applicable to Coverage A includes the named insured and, except where specifically stated to the contrary, also includes
>
> (a) the spouse of the named insured residing in the same household as the named insured.
>
> (b) any other person but only while using the described automobile and any person or organization legally responsible for the use thereof provided the actual use of the described automobile is with the permission of the named insured." (T. 33.) (Hereinafter called Omnibus Clause.)

It applied to accidents occurring in the U.S.:

> "This policy applies only to accidents which occur and to direct and accidental losses to the automobile which are sustained during the policy period, while the automobile is within the United

*Hereinafter referred to as T.

States of America, its territories or possessions, Canada or Newfoundland, or is being transported between ports thereof, and is owned, maintained and used for the purposes stated as applicable thereto in the declarations" (T. 38).

It authorized the use of the automobile:

"* * * for pleasure and business which is defined as personal pleasure, family and business use, * * *" (T. 51).

On February 21, 1941, Wilbur E. Mehlin and Carol Mehlin intermarried and at all times thereafter were husband and wife. In January, 1946, Mr. Mehlin purchased such automobile for the sum of $350.00 (T. 51). The money to purchase the automobile came from his mustering out pay from the Army, money Mrs. Mehlin had in the bank, which she received from Mr. Mehlin while he was in the Army* and the balance was paid by Mr. Mehlin (T. 133, 136).

Mr. and Mrs. Mehlin had one child, a son, and made their home at Lincoln, Nebraska (T. 131). After the automobile was purchased, Mrs. Mehlin learned to drive it and obtained a driver's license to operate it (T. 148). Mr. Mehlin left the automobile at home for Mrs. Mehlin's use two or three days a week and he authorized her to use it for "what business she had" (T. 137) and Mrs. Mehlin could use it any time she wanted the car (T. 149).

On October 14, 1947, Mrs. Mehlin, accompanied by her son and Paul Weisberger and Phil Curren, drove

*The record does not show whether it was a family allowance from the United States.

the automobile to Richmond, California for a visit (T. 144, 192-3). While in California, she stayed at the residence of Carl Claggett and his family.

It is admitted by Insurer that at the time of this accident on October 31, 1947, Duane R. Claggett (hereinafter called Claggett) had the permission of Mrs. Mehlin to use this automobile (opening brief, p. 11).*

Three days after the accident, Mrs. Mehlin reported it to Insurer in a written notice (T. 153) and gave as her mailing address her residence with Mr. Mehlin, at Lincoln, Nebraska (T. 193). Before it investigated this accident, William R. Hunt, assistant claims superintendent in Northern California for Insurer, contacted Insurer's Nebraska office to ascertain whether it had insurance coverage of this automobile. On November 3, 1947, Insurer's Nebraska office verified its insurance coverage and learned that Mr. Mehlin was a resident of Lincoln, Nebraska (T. 174).

Between November 3 and 7, 1947, Insurer referred this claim to John Dennis (hereinafter called Dennis), one of its claims adjusters, for investigation (T. 190). At the time it assigned such risk for investigation, Insurer knew these facts:

(1) Its Nebraska office had issued its standard service automobile policy to Mr. Mehlin, a resident of Lincoln, Nebraska, covering this automobile, which was licensed by the State of Nebraska (T. 51, 174).

(2) Mrs. Mehlin had reported this accident to Insurer's office at Berkeley, California (T. 174).

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*Hereinafter referred to as B.

(3) At the time of this accident, Claggett was driving such automobile at Richmond, California, with the express permission of Mrs. Mehlin (T. 174).

(4) In the absence of waiver or estoppel on its part, Insurer's omnibus clause required the use of the automobile to be with the permission of its named insured, Mr. Mehlin; otherwise Insurer could deny liability for such accident (T. 33).

One of the duties of Dennis and Hunt was to determine facts from which Hunt or his superior, G. E. Meyers (hereinafter called Meyers), claims superintendent for Insurer in Northern California, could decide whether its policy covered this accident (T. 152, 174, 197).

On November 7, 1947, Insurer learned these additional facts:

(1) Its named insured, Wilbur Mehlin, was in Lincoln, Nebraska; Claggett was not personally acquainted with him; and it was physically impossible for Mr. Mehlin to have personally given Claggett permission to use this automobile (T. 196-7);

(2) Mrs. Mehlin had brought this automobile to and was staying at Richmond, California (T. 193).

On November 10, 1947, Louis V. Crowley, one of the attorneys for Appellee, wrote Insurer, stating that he represented Appellee and would discuss settlement without the expense of litigation (T. 83). On November 14, 1947, Meyers acknowledged receipt of such letter and replied that Insurer was unable to find any record of any policy issued to Claggett (T. 84).

On December 3, 1947, Dennis telephoned Appellee's attorneys and talked to Augustus Castro (hereinafter called Castro) and informed him that Insurer had a policy covering this accident and Insurer's previous report that it did not have such insurance was in error (T. 85). Upon learning of such insurance coverage, Appellee commenced an action in the Superior Court of the State of California, in and for the County of Contra Costa, to recover damages for the wrongful death of said Charles E. Porter, caused by the negligence of Claggett in driving said automobile, and joined as defendants Mr. and Mrs. Mehlin, upon the grounds, among others, that Claggett was driving with the permission of said Mehlins, the owners of said automobile (T. 90-91).

On December 27, 1947, at Richmond, California, summons was personally served upon Claggett in said action (T. 178). Thereafter, at the request of Insurer, Claggett caused the copy of the summons and complaint served on him to be delivered to Insurer (T. 176) for its defense.

Upon receipt of such summons and complaint, Insurer accepted the defense of such action on behalf of Claggett and instructed its claims adjuster, Louis Gripenstraw (hereinafter called Gripenstraw), to contact Appellee's attorneys. On December 31, 1947, Gripenstraw called at their office and met Castro. In his conversation with Castro, Gripenstraw stated that Insurer had a policy covering this accident, that Mrs. Mehlin had permission to use the car and had given Claggett permission to use it and, after indicating that the limit of Insurer's policy was $10,000.00,

offered Appellee $7500.00 in settlement of her claim (T. 85-87). Appellee was advised of such offer of settlement by letter (T. 87).

On January 13 and 22, 1948, telephone conversations took place between Gripenstraw and Castro, wherein Insurer's offer of $7500.00 was rejected and Gripenstraw stated it would be necessary for Insurer's board to pass on the case before any higher settlement authority could be obtained (T. 87-88).

On January 28, 1948, Meyers, Insurer's claims superintendent, instructed his assistant, Hunt, to and he did contact Castro for settlement of this case (T. 155-6). In such conversation, Hunt informed Castro that Insurer desired to settle this case and save the expense of turning it over to its attorneys for defense; that in such a case Insurer has paid $8500.00 and in an exceptional case $9000.00, where its policy limits were $10,000.00, but at that time his authority was limited to $7500.00 (T. 88). On February 5, 1948, by telephone, Castro informed Hunt that Appellee would not accept $7500.00 and that Insurer should turn the case over to its attorneys as Appellee would have the matter tried (T. 89).

The record does not disclose the date Insurer's board first authorized payment of the sum of $7500.00 but insurer set up a reserve of $1500.00, which was increased to $10,000.00, to cover this claim (T. 185-189), and it was stipulated that Hunt indicated to Castro that Insurer would pay $8500.00 (T. 203).

On February 6, 1948, Insurer requested of Appellee a further extension of time within which to plead and

Appellee granted such extension (T. 89); and Insurer referred its file to its attorneys, Dana, Bledsoe & Smith for defense (T. 161).

A copy of Insurer's transmittal letter to Dana, Bledsoe & Smith was sent to its Nebraska office. On February 11, 1948, W. W. Gibson, claims manager of Insurer's Nebraska office, wrote its Berkeley office, attention of Hunt, assistant claims manager, that there was a question of permission and that the Berkeley office should send the excess suit notice letter to its insured, as the Berkeley office knew the intricacies of the California law with reference to permission. Gibson's letter was referred by Hunt to Dennis. On February 24, 1948, Dennis wrote a memorandum to Hunt in which he stated that Claggett was using the automobile with Mrs. Mehlin's consent for his own benefit (T. 204-206). On April 15, 1948, Meyers, Insurer's claim superintendent, wrote Mr. Mehlin an excess suit notice letter advising him:

(1) It had forwarded its file in this claim to Dana, Bledsoe & Smith for the handling of its defense;

(2) Requested Mr. Mehlin to comply with all requests from its attorneys, as they were its duly authorized representatives; and

(3) Informed Mr. Mehlin that in the event a judgment in such case exceeded its policy limit, Mr. Mehlin would have a "possible personal liability" (T. 205).

Insurer's attorneys prepared an answer in writing on behalf of Claggett to such complaint. On the 17th day of February, 1948, one of said attorneys, Mr.

Dana, verified such answer on behalf of Claggett, and such answer was thereafter filed in said wrongful death action. Such answer expressly admitted that Insurer's named insured, Mr. Mehlin, was the owner of this automobile and Claggett was driving it with his permission (T. 90-91).

In reliance upon Insurer's representations that Insurer had an automobile policy covering Claggett in this accident and that Claggett had proper permission to use such automobile, Appellee commenced the wrongful death action. In appraising the settlement value of her claim, and rejecting Insurer's offer of settlement, Appellee accepted as true and relied upon Insurer's representations, and did not conduct any independent investigation concerning the issue of permission. At the time the wrongful death action was commenced, Mrs. Mehlin had returned to Nebraska (T. 87). Service of summons was not made on either Mr. or Mrs. Mehlin, because, since Claggett had permission to use this automobile, he was entitled to the protection of such policy to the full extent of its limits, which exceeded the $5000.00 ownership liability of Mr. and Mrs. Mehlin (T. 92).

In defense of Claggett, after filing such answer on his behalf, Insurer's attorneys performed the following acts:

(1) On March 6, 1948, they wrote Claggett advising him of the trial date for such action, that his deposition would be taken and that they would keep in touch with him (T. 243).

(2) On March 12, 1948, after a memorandum to set such action for trial was filed, they pre-

pared a formal stipulation setting such action for trial on July 7, 1948, and had the trial date set for July 7, 1948 (T. 92-93).

(3) On March 13, 1948, they wrote Claggett advising him of a change of the trial from July 6 to July 7, 1948 (T. 243).

(4) On two occasions, within a week to 10 days of the 7th of July, 1948, their Mr. Dana telephoned Castro requesting a continuance of such trial and stating he could work out a settlement if such continuance was granted (T. 93).

(5) On July 2, 1948, their Mr. Bledsoe telephoned the attorneys for Appellee, stating he was going to take over the file, as Mr. Dana could not try the case (T. 93).

(6) On July 6, 1948, Mr. Bledsoe telephoned Appellee's attorneys, stating that neither he nor Insurer had been able to locate Claggett in California and they could not produce him from Minnesota for the trial on July 7, 1948 (T. 94).

(7) On July 7, 1948, Insurer's attorneys (a) moved for a continuance upon the grounds that they had not been able to locate Claggett, and agreed that if the Court would grant such continuance Insurer would reimburse Appellee for the expense incurred by Mrs. Porter in traveling from her home in Huntington Park, California, to Martinez, California, the Court expenses covering the jury venire and the witnesses produced by Appellee. With such promise, the Court granted a continuance to July 14, 1948 (T. 94);

(b) informed Appellee's attorneys that Insurer had not obtained any reservation of rights from Claggett and that it was too late to take one, but one would be taken when Claggett arrived (T. 95); and (c) made a motion to amend Claggett's answer, which was granted, and they filed an amended answer on Claggett's behalf (T. 95).

(8) Between July 6 and 9, 1948, Insurer contacted Claggett at Mora, Minnesota, and arranged and paid for his transportation to and from Martinez, California (T. 233, 239). Prior to the 9th day of July, 1948, Insurer had not taken a reservation of rights agreement from Claggett.

Prior to July 2, 1948, Appellee's attorneys had prepared her case for trial, including the interviewing of witnesses on the issues raised by the pleadings of negligence, contributory negligence and cause of death, and had prepared instructions for the jury and were ready to go to trial on such issues in the wrongful death action.

On July 14, 1948, the trial of such wrongful death action took place. At such trial, Claggett was represented by Insurer's attorneys. Judgment was rendered in favor of Appellee against Claggett for the sum of $30,000.00, together with costs. Following the Court's decision to enter such judgment, Insurer's attorneys objected to the written findings of fact and conclusions of law and orally argued their objections. After entry of judgment for said sum, Insurer's attorneys made and orally argued a motion for new trial on behalf of Claggett (T. 96-97).

Insurer paid Dana, Bledsoe & Smith for their services and expenses in representing Claggett on its behalf in such wrongful death action (T. 239).

II.

SUMMARY OF ARGUMENT.

A reading of Insurer's statement of questions involved and specifications of errors shows that Insurer's appeal is upon the sole ground that the trial Court erred in denying Insurer's respective motions for a directed verdict and a judgment *non obstante veredicto* (B. 3-7). Therefore, the only issue on appeal is whether there was sufficient evidence to submit the factual issues of permissive use, waiver and estoppel to the jury.

Since this is a diversity of citizenship case, tried in California, the trial Court was required to apply the same law that would be applied by a California Court to all matters of "substance." Questions of burden of proof, presumptions, sufficiency of evidence and the interpretation of the terms of an insurance policy are matters of substance.

The California rule of conflicts of law determines what law would be applied by a California Court to this controversy. Under the California conflicts of laws authorities: (1) California law governs all matters falling within the description of "burden of proof," such as presumptions and sufficiency of the evidence; (2) California law governs the interpretation of the rights and obligations of a contract made

in another State in the absence of a showing that a different rule should be applied.

Under the California rule, applicable to the sufficiency of the evidence to submit the issues to the jury, the trial Court must disregard all conflicting evidence and give to the evidence in support of plaintiff's burden of proof all the value to which it is legally entitled, indulging in every legitimate inference in favor of plaintiff which may be drawn therefrom. Likewise, on appeal, the Appellate Court's duty is the same.

The term "permission" in an omnibus clause of an automobile policy include "implied" permission which may be inferred by the jury from a course of conduct or a relationship and does not require affirmative action by the named insured. The omnibus clause is at least as broad as the owner's liability for permissive use under California Vehicle Code, Section 402.

To support such permission, the evidence shows that a portion of the money used to purchase the car came from Mrs. Mehlin's bank account; that the named insured, Mr. Mehlin, gave his wife the unrestricted general use of the automobile; that Mrs. Mehlin gave Claggett express permission to use the automobile; that agents of Insurer, after investigation of the accident and permissive use, admitted that Claggett had permission to use the car. The jury was, therefore, entitled to find that, as a permittee of Mrs. Mehlin, Claggett had the implied permission of Mr. Mehlin to use the automobile.

The alleged breaches of the policy and its non-waiver provisions were both subject to and were waived by Insurer, and Insurer is estopped to assert them.

To support such waiver and estoppel, the evidence shows that Insurer knew the terms of its policy; that Insurer, within a week after the accident, had constructive knowledge of its alleged defenses under its policy and had a right to deny all liability for this accident (if its policy were breached or did not cover the loss); that the circumstances of Claggett's possession of the car would have caused a prudent person to inquire whether Claggett had the permission of its named insured, Mr. Mehlin, to use the car or whether the place it was principally garaged or used had been changed. Under such circumstances, it was the duty of Insurer to make an inquiry concerning whether Claggett had permission to use the car (either from Mr. Mehlin expressly or impliedly through Mrs. Mehlin) or whether the place where the car was principally garaged or used had been changed. Insurer has admitted that it did make an inquiry as to permissive use and change of location, but now claims that its inquiry was inadequate; the evidence shows that Insurer had the means of knowledge at hand; Insurer is, therefore, chargeable with all the facts which, by a proper inquiry, it might have ascertained, namely, a possible lack of permission or a change of location.

Notwithstanding such knowledge on its part, Insurer represented to Appellee that its policy covered

this accident, that Claggett had permission to use the automobile, and that it would pay $8500.00 of its $10,000.00 limit to settle such wrongful death claim. In reliance upon such representations, Appellee rejected such settlement offer on the basis that since there was permission she was entitled to the limits of the policy; and she incurred the expense and trouble of bringing and preparing such death action for trial, all to her detriment. Insurer's conduct thereby waived its policy defenses, and Insurer is estopped to raise such defenses.

After such waiver or estoppel occurred, Insurer could not cure the same by giving Claggett a notice of reservation of rights or having him execute a reservation of rights agreement.

It is Appellee's position that the evidence was sufficient to support the jury's verdict in her favor.

III.

ARGUMENT.

A. CALIFORNIA RULE OF CONFLICTS OF LAW APPLICABLE.

In diversity of citizenship cases involving an insurance policy, questions of burden of proof, presumptions, sufficiency of evidence and the interpretation of rights and obligations under a policy are matters of substantive law in which it is the duty of the trial Court to apply the State rule of conflicts of law, which the State Court follows in the State in which the Federal Court is sitting in determining

whether the law of the forum or elsewhere is applicable.

Erie Railroad Co. v. Tompkins (1938), 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188;

Palmer v. Hoffman (1943), 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645;

Sampson v. Channell (C.C.A. 1st, 1940), 110 F. (2d) 754 (cert. denied, 310 U.S. 650, 60 S. Ct. 1099, 84 L. Ed. 1415), 54 Am. Jur. 970, 982;

Van Meter v. Franklin Fire Ins. Co. (C.C.A. 9th, 1947), 164 F. (2d) 325.

In *Clay County Cotton Co. v. Home Life Ins. Co.* (C.C.A. 8th, 1940), 113 F. (2d) 856, in reversing a directed verdict for defendant, it was stated:

> "The appellee contends that in directing a verdict in this case the court was merely applying the procedure of the forum, that the federal decisions and not the law of Arkansas control; or in other words, that the problem presented is one of adjective and not substantive law. The question presented by the motion to direct a verdict was whether a cause of action had been proved, which clearly is a question of substantive law and the state law applied. * * * *Erie Railroad Company v. Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487.
>
> Under the liberal rule of the Arkansas decisions, the case should have been submitted to the jury and, therefore, is reversed and remanded for a new trial."

The California rule of conflicts of law is that (1) the law of the forum (California) governs all matters falling within the description of "Burden of Proof,"

such as presumptions, inferences and sufficiency of evidence, in determining motions for directed verdict and judgment *non obstante veredicto,* and (2) California law determines the validity and interpretation of the rights and obligations of a contract made in another State, in the absence of a showing that a different rule should be applied,

Tevis v. Pitcher (1858), 10 Cal. 465, 466, 478 (method of proving will);

Curry v. Williams (1930), 109 Cal. App. 649, 293 Pac. 623 (law as to nonsuit);

Delanoy v. Delanoy (1932), 216 Cal. 27, 13 P. (2d) 719 (presumption);

Ogburn v. Travelers Ins. Co. (1929), 207 Cal. 50, 276 Pac. 1004 (Texas contract interpreted under California law);

Frederick Sage & Co. v. Alexander & Oviatt Corp. (1934), 138 Cal. App. 476, 32 P. (2d) 655 (warranty implied under California law).

1. CALIFORNIA RULE ON MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NON OBSTANTE VEREDICTO.

California has set forth a number of well recognized principles which must be observed in determining whether motions for a directed verdict and judgment *non obstante veredicto* should be granted:

(a) Upon such motions, it is the trial Court's duty to view all the evidence in the light most favorable to plaintiff, resolve all conflicts in favor of plaintiff and indulge in every intendment and inference reasonably deducible from the proof in favor of plaintiff,

Mairo v. Yellow Cab Co. (1929), 208 Cal. 350, 351, 281 Pac. 66;

Dieterle v. Yellow Cab Co. (1939), 34 C. A. (2d) 97, 98, 93 P. (2d) 171.

(b) Evidence for the defense must be disregarded, and if there is evidence legally sufficient to support a verdict for plaintiff, it is the Court's duty to deny such motions, *Nash v. Wright* (1947), 82 C. A. (2d) 467, 470-473, 186 P. (2d) 686; *Est. of Flood* (1933), 217 Cal. 763, 768, 21 P. (2d) 579; the trial Court cannot weigh the evidence or determine the credibility of witnesses, as such issues are for the exclusive original determination of the jury, *Gish v. Los Angeles Ry. Corp.* (1939), 13 C. (2d) 570, 90 P. (2d) 792.

(c) The rule that an inference is dispelled by positive and direct evidence applies only when such evidence is not open to doubt and is produced by the party relying upon it (plaintiff herein) or his witnesses, *Nash v. Wright,* supra.

(d) The reviewing Court cannot reverse a judgment if the evidence of plaintiff standing alone would have warranted findings favorable to plaintiff (see, *Anthony v. Hobbie* (1945), 25 C. (2d) 814, 817, 155 P. (2d) 826), and only the evidence most favorable to the plaintiff may be examined, *Nash v. Wright,* supra.

B. SUFFICIENCY OF EVIDENCE AS TO PERMISSIVE USE, WAIVER AND ESTOPPEL SOLE ISSUE ON APPEAL.

Permissive use, waiver (knowledge and intent), estoppel (conduct and detriment) and authority of agent is each a question of fact for a jury,

Blank v. Coffin (1942), 20 C. (2d) 457, 126 P. (2d) 868 (permission);

Northwestern Portland C. Co. v. Atlantic Portland C. Co. (1917), 174 Cal. 308, 313, 163 Pac. 47 (knowledge);

Mayfield v. Fidelity & Casualty Co. (1936), 16 C. A. (2d) 611, 61 P. (2d) 83 (waiver);

Parke v. Franciscus (1924), 194 Cal. 284, 228 Pac. 435 (estoppel);

Farnum v. Phoenix (1890), 83 Cal. 246, 262-263, 23 Pac. 869 (authority of agent).

Nebraska has applied the same rule as to agency.

Hanover Fire Ins. Co. v. Gustin (1894), 40 Neb. 828, 59 N.W. 375;

Slobodisky v. Phenix Ins. Co. (1898), 53 Neb. 816, 74 N. W. 270;

Morgenstern v. Ins. Co. of Philadelphia (1911), 89 Neb. 459, 131 N. W. 969;

Billings v. German Ins. Co. (1892), 34 Neb. 502, 52 N. W. 397, 399.

Because it is appealing from an order of the trial Court denying its motion for directed verdict and judgment *non obstante veredicto,* insurer has limited the issues of this appeal to the sole question—was there sufficient evidence on such questions of fact to sustain the verdict of the jury in favor of Appellee?

C. EVIDENCE LEGALLY SUFFICIENT TO ESTABLISH PERMISSION.

The term "permission" in an omnibus clause of an automobile policy includes "implied" permission, which may be inferred by the jury from a course of conduct or a relationship and does not require affirmative action by the named insured,

Andrews v. Commercial Casualty Ins. Co. (1935), 128 Neb. 496, 259 N.W. 653;

Maryland Casualty Co. v. Ronan (1930, C.C.A. 2d Vt.), 37 F. (2d) 449, 72 A.L.R. 1360;

Georgia Casualty Co. v. Waldman (1931, C.C.A. 5th Ala.), 53 F. (2d) 24;

Aetna L. Ins. Co. v. Dunn (1936, C.C.A. 3d N.J.), 84 F. (2d) 752;

Glens Falls Indem. Co. v. Zurn (1937, C.C.A. 7th Wis.), 87 F. (2d) 988;

American Casualty Co. v. Windham (1939, C.C.A. 5th Ga.), 107 F. (2d) 88 (affg (1939, D.C.), 26 F. Supp. 261, and cert. den. (1940), 309 U.S. 674, 84 L. Ed. 1019, 60 S. Ct. 714);

Vezolles v. Home Indem. Co. (1941, D.C. Ky.), 38 F. Supp. 455 (affd. (1942, C.C.A. 6th), 128 F. (2d) 257).

The omnibus clause is at least as broad as the owner's liability for permissive use under California Vehicle Code, Section 402; see, *Bayless v. Mull* (1942), 50 C.A. (2d) 66, 122 P. (2d) 608; *Burgess v. Cahill* (1945), 26 C. (2d) 320, 158 P. (2d) 393; *Blank v. Coffin* (1942), 20 C. (2d) 457, 126 P. (2d) 868; *Souza v. Corti* (1943), 22 C. (2d) 454, 139 P. (2d) 645.

Prior knowledge of the owner of the intended use of his automobile by a permittee is not a necessary element of implied permission,

Burgess v. Cahill (1945), 26 C. (2d) 320, 323, 158 P. (2d) 393;

Scheff v. Roberts (Mar., 1950), 35 A.C. 10, 15, 215 P. (2d) 925.

Regardless of the lack of such knowledge, the relationship of the parties, their conduct and the circumstances surrounding the use of the automobile raise an inference of implied permission, *Scheff v. Roberts,* supra.

1. INFERENCE OF IMPLIED PERMISSION.

a. **Mehlins were husband and wife.**

On February 12, 1941, Mr. and Mrs. Mehlin intermarried and at all times thereafter were husband and wife (T. 135). The automobile was purchased for the sum of $350.00, which came from Mr. Mehlin's Army mustering out pay, money Mrs. Mehlin had in the bank, which she received from Mr. Mehlin while he was in the Army* and the balance was paid by Mr. Mehlin (T. 133, 136).

b. **Mrs. Mehlin had general unrestricted right to use automobile.**

After the automobile was purchased in January of 1946, Mrs. Mehlin learned to drive it and obtained a driver's license to operate it (T. 148). Mr. Mehlin left the automobile at their home for her use two or three days a week, and he authorized her to use it for "what business she had * * *" (T. 137), and Mrs. Mehlin could use the car at any time she wanted it (T. 149).

A reading of the testimony of Mr. and Mrs. Mehlin shows that Mr. Mehlin did not require Mrs. Mehlin to request permission from him to use the car before she used it, and he did not restrict the purpose for, the

*The record does not disclose whether it was a family allotment from the United States.

length of time or place in which Mrs. Mehlin could use the car (T. 126-151).

It is, therefore, clear that Mrs. Mehlin was given the general use of this car by her husband and, as pointed out in *Stewart v. Norsigian* (1944), 64 C. A. (2d) 540, 149 P. (2d) 46, such family relationship will raise an inference of permission. Before the trial, in arguing the admissibility of the chattel mortgage and the arrest of Mrs. Mehlin, Insurer admitted that such an inference arose from the evidence offered by Appellee (T. 114, 252). Such mortgage and arrest are discussed at page 33 hereof.

c. Claggett had express permission from Mrs. Mehlin.

At page 24 of its opening brief, Insurer has conceded "that Mrs. Mehlin gave permission to Claggett to use the car."

California has expressly held that the parent of a son is responsible as the owner of a car when a permittee of his son was driving, even though the parent gave specific instruction that such a permittee should not drive the car.

Souza v. Corti (1943), 22 C. (2d) 454, 139 P. (2d) 645;

Haggard v. Frick (1935), 6 C.A. (2d) 392, 44 P. (2d) 447.

One reason for refusing to allow such restriction to negative liability is that "the owner can avoid liability by refusing to permit the use of his motor car by another or procure insurance to protect him, he should not be permitted to avoid the consequences of the operator's negligence and escape liability therefor by

secret restrictions limiting the right to use the motor vehicle,"

Souza v. Corti (1943), 22 C. (2d) 454, 460, 139 P. (2d) 645;

Bayless v. Mull (1942), 50 C. A. (2d) 66, 75, 122 P. (2d) 608.

2. ADMISSIONS OF COVERAGE AND PERMISSION BY INSURER.

a. **By claims adjusters Dennis and Gripenstraw.**

On November 10, 1947, Louis V. Crowley, one of the attorneys for Appellee, wrote Insurer stating that they represented Appellee and would discuss settlement without the delay and expense of litigation (T. 83). On November 14, 1947, Meyers acknowledged receipt of such letter and replied that Insurer was unable to find any record of any policy issued to Claggett (T. 84).

On December 3, 1947, Dennis telephoned Appellee's attorneys and informed them that Insurer did have insurance coverage of this automobile, and that its previous report to the contrary was in error (T. 85).

On December 27, 1947, at Richmond, California, summons was personally served upon Claggett in said action (T. 178). Thereafter, at Insurer's instruction, Claggett caused the copy of the summons and complaint served on him to be delivered to Insurer (T. 176) for its defense.

Upon receipt of such summons and complaint, Insurer's claim superintendent, Meyers, instructed its claims adjuster, Gripenstraw, to contact Appellee's attorneys. On December 31, 1947, Gripenstraw called in person at the office of said attorneys and met Castro. In a conversation with Castro, Gripenstraw stated

that Insurer had a policy covering this automobile and would like to settle the case. When an inquiry was made concerning the limits of such policy, Gripenstraw stated the rules of Insurer prohibited the giving of such information but indicated the limits were probably $10,000.00. When Castro informed him that Appellee was entitled to the policy limits, Gripenstraw replied Insurer would not pay such amount, as it had a defense. When Castro stated the issues in the case were negligence and permissive use, and inquired whether there was a question about permission, Gripenstraw replied: "No, there isn't. We are satisfied that Mrs. Mehlin had the permission to bring the automobile out here and that Mr. Claggett had her permission to use it." Before he left the office, Gripenstraw offered on behalf of Insurer the sum of $7,500.00 in settlement of the case (T. 85-87). Appellee was advised of such settlement offer by letter (T. 87).

b. By Insurer's attorneys.

Insurer's attorneys prepared an answer to the complaint in such wrongful death action on behalf of Claggett. On the 17th day of February, 1948, one of said attorneys, Mr. Dana, the attorney in charge of the defense of such action, verified such answer on behalf of Claggett and, thereafter, filed it in such death action. The answer expressly admitted that Insurer's named insured, Mr. Mehlin, was the owner of this automobile and Claggett was driving it with his permission (T. 90-91). It should not need any citation of authority to support the rule that such an admission establishes a *prima facie* case of permissive use.

Insurer's contention that since this answer was superseded by an amended answer, it cannot be used as an admission is without merit.

A reading of the cases cited by Insurer (*Kambourian v. Gray* (1947), 81 C. A. (2d) 783, 185 P. (2d) 27; *Gajanich v. Gregory* (1931), 116 Cal. App. 622, 3 P. (2d) 389; *Weissbaum v. Eibeshutz* (1930), 211 Cal. 170, 294 Pac. 396) and the proof concerning such original answer (T. 90-91) demonstrates the fallacy of Insurer's contention. In each of said cases, such superseded pleading was offered and admitted, only, for impeachment purposes, while in this action such original answer was in evidence for all purposes within the issues of this action. Where there was no objection to or limitation of the offer of proof, California has expressly held that such superseded answer is an admission of the fact stated in such answer,

> *Coward v. Clanton* (1889), 79 Cal. 23, 28, 21 Pac. 359 (cited with approval in *Tieman v. Red Top Cab Co.* (1931), 117 Cal. App. 40, 45, 3 P. (2d) 381, and *Dolinar v. Pedone* (1944), 63 C. A. (2d) 169, 146 P. (2d) 237).

Further, the uniform California rule is settled that where objectionable evidence, or evidence admissible for a limited purpose, is admitted without objection or limitation, it is competent evidence and must be given full weight in determining the sufficiency of the evidence,

> *Holzer v. Read* (1932), 216 Cal. 119, 123, 13 P. (2d) 697,

the Court said:

"While opposing counsel may move to strike it out if for any reason it is improper to be admitted, so long as it stands it is competent evidence to be considered. Where, as here, the insufficiency of the evidence is the question to be determined, full weight must be given to evidence which would have been excluded had objection been made, and even to evidence erroneously admitted against objection provided it be relevant. Evidence may tend to prove the issues and yet be incompetent. (Hayne on New Trial and Appeal, sec. 98.)

In *Goode v. Smith* (1859), 13 Cal. 81, one of the questions involved was as to the ownership of land. A witness had been permitted to testify upon the subject. In discussing this evidence, the court held that while it was not the best mode of proving the fact, nevertheless no objection having been taken to its admissibility, it was proper for the purpose."

Riverside Rancho Corp. v. Cowan (1948), 88 C. A. (2d) 197, 207, 198 P. (2d) 526;

Hatfield v. Levy Bros. (1941), 18 C. (2d) 798, 808, 117 P. (2d) 841;

Ingraham v. Smith (1948), 83 C. A. (2d) 807, 189 P. (2d) 721—proof of agency.

i. Affidavit of Dana inadmissible; if admissible, it supports inference Insurer's file showed Clagett had permission of named insured.

In determining the propriety of Insurer's motions, it was the duty of the trial Court to disregard such affidavit, as evidence for the defense must be disregarded,

Nash v. Wright (1947), 82 C. A. (2d) 467, 470, 186 P. (2d) 686.

Further, under Rule 43(a) of the Federal Rules of Civil Procedure, the trial Court was entitled to apply the California rule on the admissibility of such affidavits, unless the Federal rule of evidence would make the affidavit admissible. In California, an affidavit is not admissible unless its use is authorized by Section 2009 of the Code of Civil Procedure of California or other code sections,

Moon v. Moon (1944), 62 C. A. (2d) 185, 188, 144 P. (2d) 596;

Oil Tool Exchange, Inc. v. Hasson (1935), 4 C. A. (2d) 544, 41 P. (2d) 211;

Reidy v. Collins (1933), 134 Cal. App. 713, 722, 26 P. (2d) 712;

Lacrabere v. Wise (1904), 141 Cal. 554, 75 Pac. 185;

1 *Cal. Jur.* 677, et seq.

And the fact that the affiant cannot be produced does not make his affidavit admissible,

People v. Barnett (1929), 99 Cal. App. 409, 416, 278 Pac. 885.

Over the objection of Appellee that such affidavit was inadmisible as hearsay evidence, the trial Court admitted the affidavit on the issue of estoppel (T. 100, 251), so even under the trial Court's ruling it is not to be considered on the issue of permission. However, it was error to admit such affidavit for any purpose. It is replete with legal conclusions and opinions of the affiant and it should be disregarded by this Court. Further, while the affidavit expressly states *"that affiant prepared the answer upon information con-*

tained in the file and for that reason admitted that the automobile was being driven with the consent of the defendant Wilbur M. Mehlin; . . .", it does not state that such file did not contain any information that such automobile was not being used with the permission of Mr. Mehlin. Therefore, an inference arises from such affidavit that Dana's file contained some information that Mr. Mehlin consented to Claggett's use of this automobile; otherwise, Dana would not have made such admission.

3. PRESUMPTIONS ESTABLISHED PERMISSION.

It is well established under California law that Appellee's burden of proof was aided by the statutory presumptions that a person is innocent of wrong and the law has been obeyed, i.e., of using property of another with the latter's consent,

Code of Civil Procedure, Sec. 1963 (1) and (33);

Prickett v. Whapples (1935), 10 C. A. (2d) 701, 52 P. (2d) 972;

Lanfried v. Bosworth (1941), 45 C. A. (2d) 408, 114 P. (2d) 406;

Nash v. Wright (1947), 82 C. A. (2d) 467, 473, 186 P. (2d) 686;

Souza v. Corti (1943), 22 C. (2d) 454, 460, 139 P. (2d) 645;

Vaughn v. Jonas (1948), 31 C. (2d) 586, 601, 191 P. (2d) 432.

From the family relationship of husband and wife between Mr. and Mrs. Mehlin, Mrs. Mehlin's unrestricted general right to use the automobile, Mrs.

Mehlin's express consent to Claggett for its use, the admissions by Insurer's agents and attorney of Claggett's permission to use the automobile, the presumptions in favor of Claggett's lawful use of it, and the inferences reasonably deducible from all of such facts and presumptions, the jury was justified in its determination that Claggett had implied permission to use the automobile.

4. APPELLEE'S PROOF NOT DISPELLED BY INSURER'S EVIDENCE.

In determining whether motions for a directed verdict and for judgment *non obstante veredicto* should be granted, the trial Court cannot weigh the evidence offered by Insurer or determine the credibility of the witness, but can only examine the evidence to determine whether there was evidence of sufficient substance to support a verdict for Appellee, and must consider only evidence favorable to plaintiff in making its determination.

Estate of Flood (1933), 217 Cal. 763, 768-9, 21 P. (2d) 579;

Gish v. Los Angeles Ry. Corp. (1939), 13 C. (2d) 570, 90 P. (2d) 792;

Phillips v. Southern Pacific Co. (1936), 14 C. A. (2d) 454, 58 P. (2d) 688.

Despite such well established rule, Insurer contends that its evidence showed as a matter of law that Claggett did not have permission to use this car and that such evidence dispelled any inference of permission, citing, *Engstrom v. Auburn Auto. Sales Corp.* (1938), 11 C. (2d) 64, 77 P. (2d) 1059; *Kimbles v. Kelly*

(1935), 6 C. A. (2d) 91, 43 P. (2d) 871; *Montanya v. Brown* (1939), 31 C. A. (2d) 642 at 645, 88 P. (2d) 745, and *Myers v. McMaken* (1937), 133 Neb. 524, 276 N.W. 167; *Harrell v. People's City Mission* (1936), 131 Neb. 138, 267 N.W. 344 (citing the California cases of *Hanchett v. Wisely* (1930), 107 Cal. App. 230, 290 Pac. 311; *Philleo v. Hefnider* (1942), 140 Neb. 808, 2 N.W. (2d) 31; *Witthauer v. Paxton-Mitchell Co., et al.* (1945), 146 Neb. 436, 19 N.W. (2d) 865).

In explaining the *Engstrom* case, *supra,* California has expressly held that on a motion for directed verdict the presumptions or inferences raised by a plaintiff's circumstantial evidence are not dispelled by clear, positive and uncontradicted evidence of the defendant, but such presumptions or inferences remain as evidence in the case sufficient to support a judgment for plaintiff, except in the rare case when there is produced by the plaintiff himself positive and direct evidence contrary to the presumptions or inferences raised by plaintiff's own proof,

> *Nash v. Wright* (1947), 82 C. A. (2d) 467, 470-473, 186 P. (2d) 686;
>
> *Chakmakjian v. Lowe* (1949), 33 C. (2d) 308, 313, 201 P. (2d) 801.

Further, a review of Insurer's evidence shows that it is not clear, positive and uncontradicted evidence not open to doubt. As stated in *Blank v. Coffin* (1942), 20 C. (2d) 457, 461, 126 P. (2d) 868:

> "Usually, the opposing party introduces evidence as to the nonexistence of the fact in issue,

and the jury must then determine the existence or nonexistence of the fact from all the evidence before it. If the evidence contrary to the existence of the fact is clear, positive, uncontradicted, and of such a nature that it can not rationally be disbelieved, the court must instruct the jury that the nonexistence of the fact has been established as a matter of law. (*Engstrom v. Auburn Auto Sales Corp.,* 11 Cal. (2d) 64 (77 P. (2d) 1059); *Crouch v. Gilmore Oil Co.,* 5 Cal. (2d) 330 (54 P. (2d) 709); *Maupin v. Solomon,* 41 Cal. App. 323 (183 Pac. 198).) The jury, however, is the sole judge of the credibility of the witnesses (Cal. Code Civ. Proc., sec. 1847; see cases cited in 27 Cal. Jur. 182, sec. 156) and is free to disbelieve them even though they are uncontradicted if there is any rational ground for doing so. (*Hinkle v. Southern Pacific Co.,* 12 Cal. (2d) 691 (87 P. (2d) 349); *Barsha v. Metro-Goldwin-Mayer,* 32 Cal. App. (2d) 556 (90 P. (2d) 371); *Burke v. Bank of America etc. Assn.,* 34 Cal. App. (2d) 594 (94 P. (2d) 58); *People v. La Fleur,* 42 Cal. App. (2d) 50 (108 P. (2d) 99). See cases collected in 27 Cal. Jur. 184, sec. 156; 8 A.L.R. 796.) In most cases, therefore, the jury is free to disbelieve the evidence as to the nonexistence of the fact and to find that it does exist on the basis of the inference. (*Bushnell v. Tashiro, supra; Market Street Ry. Co. v. George,* 116 Cal. App. 572, 576 (3 P. (2d) 41); *Day v. General Petroleum Corp.,* 32 Cal. App. (2d) 220 (89 P. (2d) 718).)

"There are many reasons why a jury may refuse to believe a witness. Section 1847 of the Code of Civil Procedure provides: 'A witness is presumed to speak the truth. This presumption,

however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.' Section 2061(3) of the Code of Civil Procedure provides: 'That a witness false in one part of his testimony is to be distrusted in others.' In passing on the credibility of a witness, the jury is entitled to consider his interest in the result of the case. (See cases collected in 27 Cal. Jur. 180, sec. 154.)''

The application of such well settled rules to Insurer's evidence demonstrates the trial Court would have erred had it granted such motions:

The facts that there was a family relationship of husband and wife between Mr. and Mrs. Mehlin, that Mrs. Mehlin had the unrestricted general use of the automobile, that she gave permission to Claggett to use it, and that Insurer, through its agents and attorneys, admitted that Claggett had the permission of its named insured to use the automobile, and the presumptions in favor of Claggett's lawful use of it were sufficient to support an inference that the car was being driven with the permission of Insurer's named insured within the meaning of its omnibus clause. When Insurer offered evidence contrary to such inference in the testimony of Louis Gripenstraw, John Dennis, William Hunt, Mr. Dana's affidavit and Mr. and Mrs. Mehlin, the jury was entitled to disbelieve their testimony on several grounds: Gripenstraw, Dennis, Hunt and Dana was each an employee of Insurer and each had an interest in the outcome of

this case since each would naturally desire to remain in the good graces of Insurer; further, Gripenstraw and Dana each made an express admission of such permissive use and, in his affidavit, Dana acknowledged that his admission was based upon the contents of his file. Dana's affidavit does not assert that his admission was inadvertent or a mistake and does not assert that the file did not disclose information which warranted his admission that Claggett had the permission of the named insured. As to Mr. and Mrs. Mehlin, the jury knew that each of them was financially interested in defeating liability. It further knew that Mr. and Mrs. Mehlin did not raise any question about Claggett's permission to drive the car until after Insurer informed Mr. Mehlin, some six months after the accident, that he had a "possible personal liability"; also, it knew that Mr. Mehlin did not pay Ginsberg & Ginsberg to write the letter of April 19, 1948, from which Insurer claims it first learned of a possible defense of lack of permission (T. 130-140). Such reasons constitute a rational ground for rejecting their testimony, *Hicks v. Reis* (1943), 21 C. (2d) 654 at 661, 134 P. (2d) 788, and *Blank v. Coffin, supra.* Further, since the criminal action against Mrs. Mehlin for removing a mortgaged car from Nebraska without the mortgagee's permission was dismissed by the county attorney for insufficient evidence (T. 119-120, 135) and no criminal charge was placed against Claggett, the jury could infer that Mrs. Mehlin had permission to drive the car to California and Claggett had permission of its owner, the named insured, to use it in California.

a. Insurer's citations that inferences or presumptions of permission vanish not in point.

At page 27 of its opening brief, Insurer has stated the following Nebraska cases to the effect that any inferences or presumption of permission vanishes in the face of positive evidence:

Myers v. McMaken (1937), 133 Neb. 524, 276 N.W. 167;

Harrell v. People's City Mission (1936), 131 Neb. 138, 267 N.W. 344 (citing the California case of *Hanchett v. Wiseley* (1930), 107 Cal. App. 230, 290 Pac. 311);

Philleo v. Hefnider (1942), 140 Neb. 808, 2 N.W. (2d) 31;

Witthauer v. Paxton-Mitchell Co., et al. (1945), 146 Neb. 436, 19 N.W. (2d) 865.

Each of such cases is distinguishable from the case at bar because in each of them the issue was whether the driver of the vehicle was acting in the scope of the defendant's employment at the time of the accident, and the record was "devoid of any proof" that the driver was acting in the scope of his employment; see, *Myers v. McMaken* (1937), 133 Neb. 524, 276 N.W. 167.

Where the record is devoid of any proof of an issue, there can be no question of dispelling an inference to support such issue, *Estate of Flood* (1933), 217 Cal. 763, 768, 21 P. (2d) 579.

The California authorities (and no contrary Nebraska authorities have been found) hold that the

evidence may be adequate to establish permissive use and still be inadequate to establish agency.

Montanya v. Brown (1939), 31 C.A. (2d) 642, at 645, 88 P. (2d) 745.

The elements of permissive use and the elements of agency are manifestly different. The Nebraska cases on the issue of agency are, therefore, not in point.

Further, as already stated, the California and not the Nebraska law governs the issue of the sufficiency of the evidence in the case at bar.

b. Insurer's citations that only a permittee of named insured is covered not in point.

At pages 20 and 26 of its opening brief, Insurer has cited several cases allegedly holding that only a permittee of the named insured is covered under an omnibus clause. All of these cases are distinguishable from the case at bar:

i. California cases.

In *Kimbles v. Kelly* (1935), 6 C.A. (2d) 91, 43 P. (2d) 871, two weeks after his discharge, a discharged employee obtained his employer's car from a garage under false pretenses. There was no evidence as to how the driver received possession of the car. The case holds simply that a showing of mere ownership, without more, does not raise an inference of permissive use. A family relationship, on the other hand, does raise an inference of permissive use in a third person who received permission from a member of the family other than the named insured.

Souza v. Corti (1943), 22 C. (2d) 454, 139 P. (2d) 645.

In *Montanya v. Brown* (1939), 31 C.A. (2d) 642, 88 P. (2d) 745, where a partner's sister-in-law was driving a co-partnership car for pleasure, the Court held that while the evidence showed permissive use, there was no evidence of agency. See, *Bayless v. Mull* (1942), 50 C.A. (2d) 66, 73, 122 P. (2d) 608 and *Stewart v. Norsigian* (1944), 64 C.A. (2d) 540, 550, 149 P. (2d) 46, which have distinguished *Montanya v. Brown, supra.*

Engstrom v. Auburn Auto. Sales Corp. (1938), 11 C. (2d) 64, 77 P. (2d) 1059, involved the use of a car by its prospective purchaser for personal purposes, when he only had permission to show it to his family and return it to the seller. The Court found that the evidence was uncontradicted on the limited permission given. The case has been distinguished and its application restricted in *Nash v. Wright* (1947), 82 C.A. (2d) 467, 470, 186 P. (2d) 686; *Chakmakjian v. Lowe* (1949), 33 C. (2d) 308, 313, 201 P. (2d) 801; *Burgess v. Cahill* (1945), 26 C. (2d) 320, 324, 326, 158 P. (2d) 393; *Blank v. Coffin* (1942), 20 C. (2d) 457, 126 P. (2d) 868; *Hicks v. Reis* (1943), 21 C. (2d) 654, 661, 134 P. (2d) 788; and *Reed v. Cortez* (1948), 88 C.A. (2d) 416, 419, 198 P. (2d) 911.

ii. Cases where permissive use was not in issue.

In *Wigington v. Ocean Acc. & Guarantee Co.* (1930), 120 Neb. 162, 231 N.W. 770, the automobile policy was issued to a corporation, which was the named insured under the policy; the automobile was not owned by the corporation but was owned by the wife of the vice-president of the corporation; the wife allowed a third person to drive her car on his per-

sonal business. The Court held that the policy covered only the property of the corporation and property being used in the business of the corporation during the time of such use. It is evident that (1) the wife who owned the car and gave permission was not the wife of the named insured, and (2) permissive use by the named insured (as distinguished from use in the business of the named insured during the time of such use) was not involved.

iii. Federal Court cases where the evidence was uncontradicted.

In *Columbia Cas. Co. v. Lyle* (C.C.A. 5th, 1936), 81 F. (2d) 281, a farm caretaker, contrary to strict instruction from his owner, permitted a farm hand to drive the truck off the farm, and the farm hand used it contrary to the caretaker's instructions. The evidence as to non-permission was uncontradicted.

In *U. S. F. & G. Co. v. Mann* (C.C.A. 4th, 1934), 73 F. (2d) 465, a municipal employee, who had a municipal car for municipal business, allowed his son to use it for pleasure. The evidence was uncontradicted that use of the car was limited to official municipal business only. This case simply affirms the findings of the trial Court in favor of the defendant. It does not involve the issue of taking the case away from the jury.

iv. Federal Court cases where the trier of fact decided in favor of the defendant.

In *Trotter v. Union Ind. Co.* (C.C.A. 9th, 1929), 35 F. (2d) 104, a car salesman, who was given permission to use a friend's car in the sale of automobiles, let a stranger use the car for pleasure. This case

simply affirms the findings of the trial Court in favor of the defendant. It does not involve the issue of taking the case away from the jury.

In *Fredericksen v. Employers* (C.C.A. 9th, 1928), 26 F. (2d) 76, the owner let a friend use his car to attend a funeral and after the funeral such friend used the car on a drunken joy ride. The evidence of the limited purpose of the permission was uncontradicted. This case simply affirms the findings of the trial Court in favor of the defendant. It does not involve the issue of taking the case away from the jury.

All of the foregoing cases, however, were decided prior to *Erie Railroad Co. v. Tompkins* (1938), 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

D. EVIDENCE LEGALLY SUFFICIENT TO ESTABLISH WAIVER AND ESTOPPEL.

1. APPELLEE IS BENEFICIARY OF THIS POLICY.

Under "Insurance Agreements," Coverage A(1) of its policy, Insurer agreed to "pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, because of bodily injury, * * * and death at any time resulting therefrom sustained by any person or persons caused by accident and arising out of the ownership, operation, maintenance or use of" this automobile (T. 30). Such sum is payable to the injured persons, the heirs of the decedent, or to the insured, if he pays such person or heirs; and Condition 5(b) of its policy gives them a

right of action against Insurer for such sum, as follows:

> "(b) With respect to Coverage A no action shall lie against the Company until the amount of the insured's obligation to pay shall have been finally determined either by final judgment against the insured after actual trial or by written agreement of the insured, the claimant and the Company.
>
> Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy" (T. 41).

Under the law of California, where the right to bring such an action was conferred by statute, the injured third party has been held to be a beneficiary of such a policy.

> *Bachman v. Independence Indemnity Co.* (1931), 112 Cal. App. 465, at 483, 297 Pac. 110;
>
> *Panhans v. Associated Indemnity Corp.* (1935), 8 C.A. (2d) 532, at 535, 47 P. (2d) 791, approves similar language in *Malmgren v. Southwestern A. Ins. Co.* (1927), 201 Cal. 29, 255 Pac. 512.

Since Insurer, by express provision in its Condition 5(b), gave Appellee a right of action against it, Appellee is a beneficiary of its policy.

While it is true that in the absence of waiver or estoppel on the part of the Insurer, an insured or the injured third party is bound by the terms of the insurance policy, California has rejected the narrow

language of *Royal Indemnity Co. v. Watson* (C.C.A. 5th, 1932), 61 F. (2d) 614 and *Home Indemnity Co. v. Standard Acc. Ins. Co.* (C.C.A. 9th, 1948), 167 F. (2d) 919, to the effect that an insurance policy "was not designed for the protection of strangers." See, *Souza v. Corti* (1943), 22 C. (2d) 454, 460, 139 P. (2d) 645; *Bayless v. Mull* (1942), 50 C.A. (2d) 66, 122 P. (2d) 608, which point out that the basis of permissive use liability is "to curb the growing menace of death and injury" from the operation of an automobile. See, *Burgess v. Cahill* (1945), 26 C. (2d) 320, 323, 158 P. (2d) 393.

Should not the public be entitled to the benefits and protection of the omnibus clause of an insurance policy, when an insurance company has been paid to assume the liability for such negligent use of an automobile?

2. WAIVER AND ESTOPPEL DEFINED AND DISTINGUISHED.

In its opening brief, Insurer has failed to distinguish between the terms "waiver" and "estoppel" and treated them as synonymous. Such terms are not synonymous. The distinguishing elements of each term have been described in 56 Am. Jur. 103, which is quoted in part as follows:

> "* * * As already seen, a waiver is an intentional relinquishment, while the indispensable elements of an estoppel are ignorance of the party who invokes the estoppel, a representation by the party estopped which misleads, and an innocent and deleterious change of position in reliance on that representation. Furthermore, an estoppel consists of a preclusion which in law prevents a party from alleging or denying a fact in conse-

quence of his own previous act, averment, or denial. * * * Among the differences between estoppel and waiver are that in an estoppel the intention to relinquish a right does not need to be present, while a choice between the relinquishment and the enforcement of a right is essential to waiver; and that waiver depends upon what one himself intends to do regardless of the attitude assumed by the other party, whereas estoppel depends rather upon what the other party has done. Waiver does not necessarily imply that the other party has been misled to his prejudice, but an estoppel always involves this element. Estoppel results from an act which operates to the injury of the other party, while waiver may even affect him beneficially. Estoppel frequently carries the implication of fraud, but waiver never does. Waiver involves both knowledge and intention; an estoppel may arise where there is no intent to mislead. Waiver involves the act and conduct of only one of the parties, while estoppel involves the conduct of both. Waiver presupposes a full knowledge of a right existing and an intentional surrender or relinquishment of that right. It contemplates something done designedly or knowingly, which modifies or changes existing rights or varies or changes the terms of provisions of the contract."

In accord are:

Bastanchury v. Times-Mirror Co. (1945), 68 C.A. (2d) 217, 240, 156 P. (2d) 488;

Hartford Fire Ins. Co. v. Landfare (1902), 63 Neb. 559, 88 N.W. 779.

The elements of waiver have been stated as follows:

> "* * * to constitute a waiver there must be an existing right, benefit or advantage, a knowledge, actual or constructive, of its existence: and an actual intention to relinquish it or such conduct as warrants an inference of the relinquishment."
> 25 *Cal. Jur.* 927.

A similar definition of waiver set forth in 27 R.C.L. 908 has been quoted and approved in

Craig v. White (1921), 187 Cal. 489, 202 Pac. 648;

First Nat'l Bank v. Davis (1932), 123 Neb. 304, 242 N.W. 655;

Cutler v. Roberts (1878), 7 Neb. 4, 29 Am. Reports 371.

a. Constructive knowledge is sufficient for waiver.

Both California and Nebraska follow the commonly accepted rule that "every person, who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact.

Civil Code of California, Sec. 19;

Northwestern P. C. Co. v. Atlantic P. C. Co. (1917), 174 Cal. 308, 313, 163 Pac. 47;

Shapiro v. Equitable Life Assur. Soc. (1946), 76 C.A. (2d) 75, 86, 172 P. (2d) 725.

In *Baxter v. National Mortgage Loan Co.* (1935), 128 Neb. 537, 259 N.W. 630, at 640, it was stated, as follows:

> "As heretofore shown, the information actually communicated to Baxter, as early as December

10, 1924, was ample to put him on inquiry, and there can be no question that to Baxter the means of knowledge was at hand. The rule is: 'Whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained. This, in effect, means that notice of facts which would lead an ordinarily prudent man to make an examination which, if made, would disclose the existence of other facts is sufficient notice of such other facts'. 20 R.C.L. 346, par. 7."

i. Insurer's citations are not in point.

In its opening brief, at pages 27-31, Insurer has cited several California and Nebraska cases to the effect that an insurer must have knowledge of the facts before a waiver occurs. A reading of each of those cases shows that not one of them holds that constructive knowledge is not a proper basis for a waiver. The following cases, cited by Insurer, deal with estoppel and are distinguishable from the case at bar upon the grounds that in each of them the insured made a positive misrepresentation of a material fact to his insurer, which was misled by such misrepresentation, and the Courts held that one who has committed a fraud cannot claim the benefit of an estoppel.

Mirich v. Underwriters at Lloyd's, London (1944), 64 C.A. (2d) 522, at 530, 149 P. (2d) 19, involving a malpractice policy, the insured definitely misrepresented to insurer whether he had been sued for malpractice;

Cohen v. Metropolitan Life Ins. Co. (1939), 32 C.A. (2d) 337, 89 P. (2d) 732, where the

insured specifically represented to his insurer that he contracted the disease after and not before the issuance of its policy;

George v. Guarantee Mut. Life Co. (1944), 144 Neb. 285, 13 N.W. (2d) 176, insured falsely and fraudulently misrepresented his physical condition to insurer.

Also, in *Home Indemnity Co. v. Standard Acc. Ins. Co.* (C.C.A. 9th, 1948), 167 F. (2d) 919, the insured gave his insurer five inconsistent and varying versions of his accident.

The following cases are distinguishable upon the grounds that there was no evidence of waiver or estoppel in that the Insurer either had no knowledge of alleged breach; or that as soon as Insurer obtained knowledge, it immediately disclaimed liability or took a reservation of its rights for its future handling of the defense; or after such knowledge it did nothing to affect the rights of the parties.

McDaniels v. General Ins. Co. (1934), 1 C.A. (2d) 454, 461, 46 P. (2d) 829;

Wigington v. Ocean Acc. & Guarantee Co. (1930), 120 Neb. 162, 231 N.W. 770;

Commercial Standard Ins. Co. v. Robertson (C.C.A. 6th, 1947), 159 F. (2d) 405;

Hamilton v. Home Fire Ins. Co. (1894), 42 Neb. 883, 61 N.W. 93;

Royal Indemnity Co. v. Watson (C.C.A. 5th, 1932), 61 F. (2d) 614;

Oak Creek Bank v. Helmer (1899), 59 Neb. 176, 80 N.W. 891,

or that at the time Insurer acted the plaintiff knew Insurer had already rejected liability,

Klanecky v. Woodmen of World (1934), 126 Neb. 809, 254 N.W. 577;

Sawyer v. Sovereign Company (1920), 105 Neb. 395, 181 N.W. 191;

Nat'l Aid Asso. v. Brachter (1902), 65 Neb. 378, 91 N.W. 379, 93 N.W. 1122.

b. Waiver implied from conduct of insurer.

Nebraska has repeatedly held that *if an insurer with knowledge or notice of facts entitling it to assert a policy defense, if it chose, does any act thereafter inconsistent with its reliance upon such defense, and the insured thereby is induced to act in the belief that such policy is a valid and subsisting contract, a waiver occurs,*

Hartford Fire Ins. Co. v. Landfare (1902), 63 Neb. 559, 88 N.W. 779, where it is stated:

"The defendant asked the trial court to instruct the jury as follows: 'No alleged waiver of any condition or provision of the policy would prevent the defendant from insisting it was void, unless the party insured acted to his own prejudice upon the faith of such waiver'—which was refused, and this ruling, it is insisted, was erroneous. It is probably true that the request, rightly understood, correctly states the law; but it may be well doubted whether, if given in this case without explanation, it might not have been misleading to the jury. To constitute a waiver of the provisions of a policy of insurance providing for forfeiture, the acts relied upon need not be attended with such equitable circumstances as would be required to constitute an estoppel. It is

not necessary that the party be induced by the acts in question to in any manner change his position with reference to the subject of the negotiation, even when the acts are done after the forfeiture occurs. *Billings v. Insurance Co.*, 34 Neb. 502, 52 N.W. 397; *Hollis v. Insurance Co.*, 65 Iowa 454, 21 N.W. 774. The instructions given were quite exhaustive, and in the *fifteenth instruction given by the court on its own motion the jury was told that if the defendant, with full knowledge of the facts, neglected to declare its intention of insisting on the forfeiture, but by its acts recognized and treated the policy as a valid and subsisting contract between it and the plaintiffs, and induced them to act in that belief, it will be deemed to have waived such forfeiture.* Under the facts as disclosed by the evidence in this case, the plaintiffs negotiated with the defendant during six months; and, without doubt, if the jury believed from the evidence that during these negotiations the defendant induced the plaintiffs to act in the belief that the policy was valid, by recognizing and so treating the policy, then it must follow that the provisions of the policy relied upon must be considered as waived by the company. We think that this fifteenth instruction correctly stated the law to the jury, and that it contained every essential element that the defendant was entitled to have embraced therein; and the failure of the court to state the converse of the proposition contained in this instruction is not, in the condition of the evidence in this case, reversible error."

German Mutual Fire Ins. Co. v. Palmer (1902), 3 Neb. 688, 92 N.W. 624;

Hunt v. State Ins. Co. (1902), 66 Neb. 121, 92 N.W. 921;

Lydick v. Gill (1903), 68 Neb. 273, 94 N. W. 109.

And, in California, such waiver may be shown by the conduct of the insurer, i.e., where its acts or omissions, according to their natural import, are so inconsistent with the intent to enforce a right as to induce a reasonable belief that it has been waived.

Bastanchury v. Times-Mirror Co. (1945), 68 C.A. (2d) 217, 240, 156 P. (2d) 488;

Spiegelman v. Metropolitan L. Ins. Co. (1937), 21 C.A. (2d) 299, 301, 68 P. (2d) 1006;

Erskine v. Upham (1942), 56 C.A. (2d) 235, 248, 132 P. (2d) 219;

Medico-Dental Etc. Co. v. Horton & Converse (1942), 21 C. (2d) 411, 432, 132 P. (2d) 457.

c. Elements of estoppel not required for waiver.

An effective waiver does not require a new agreement or estoppel,

Home Fire Ins. Co. v. Kuhlman (1899), 58 Neb. 488, 78 N.W. 936, where it is stated:

"The contention that a waiver must have the elements of an estoppel in cases of this kind cannot be sustained. 'It is,' says Sutherland, J., in *People v. President, etc. of Manhattan Co.,* 9 Wend. 381, 'a technical doctrine, introduced and applied by courts for the purpose of defeating forfeitures.' In *Titus v. Insurance Co.,* 81 N.Y. 410, it was held that *an effective waiver need not be based on either a new agreement or an estoppel.* Substantially the same holding was made in *Hollis v. Insurance Co.,* 65 Iowa 454, 21 N.W. 774; and such is now the settled doctrine of this court. *Billings v. Insurance Co.,* 34 Neb. 502, 52 N.W. 397; *Eagle Fire Co. of New York v. Globe*

d. Change of position or prejudice not required for waiver.

Under Nebraska law, change of position by or prejudice to Appellee is not necessary to constitute a waiver by Insurer. Such waiver occurred when Appellee was induced to act in the belief that Insurer was treating its policy as a valid and subsisting contract between them,

Hartford Fire Ins. Co. v. Landfare (1902), 63 Neb. 559, 88 N.W. 779;

Further, even when the acts are done after the condition is breached, a waiver arises even though the party relying upon the acts of the Insurer does not change her position in any manner with reference to the subject of the negotiation,

Hartford Fire Ins. Co. v. Landfare, supra;
Home Fire Ins. Co. v. Kuhlman, supra.

3. CONSTRUCTIVE KNOWLEDGE OF INSURER SHOWN BY EVIDENCE.

Whether Insurer had notice of circumstances sufficient to put a prudent man upon inquiry as to the facts of "permission" and of the place where the automobile was "principally garaged and used", and whether by prosecuting such inquiry Insurer might have learned of such facts, are questions of fact for the jury,

Northwestern P. C. Co. v. Atlantic P. C. Co. (1917), 174 Cal. 308, 313, 163 Pac. 47.

There was sufficient evidence from which the jury could and did find Insurer had such duty of inquiry and could have learned such facts as it now claims entitles it to a defense.

First, Insurer is presumed to know the provisions of its own policy and that in the absence of waiver or estoppel on its part, Insurer's omnibus clause required

the use of the automobile to be with the permission of its named insured, Mr. Mehlin; otherwise, Insurer could deny liability for the accident. Its claims department and adjusters knew that such permission was required. Insurer's assistant claims superintendent for Northern California, Mr. Hunt, admitted it was the duty of Insurer's claims department, when the notice of this accident was received on November 3, 1947, to first determine whether Insurer had coverage of the loss; and, if it did, whether there was any liability for the loss covered by its policy (T. 152, 174, 197); and Insurer's Nebraska claims superintendent, by his letter of February 11, 1948, pointed out to Mr. Hunt that the condition which controlled Insurer's coverage was the question of Claggett's permission, and, because of the intricacies of the California law, he refused to write the excess suit notice and asked Mr. Hunt to take care of writing such notice according to California law (T. 204). Such letter is undisputed evidence of Insurer's recognition of its duty to inquire concerning permissive use.

Second, at the time it assigned this loss to its adjuster Dennis, Insurer knew these facts:

(1) Its Nebraska office had issued its standard service automobile policy to Mr. Mehlin, a resident of Lincoln, Nebraska, covering this automobile, which was licensed by the State of Nebraska (T. 51, 174).

(2) The accident occurred in Richmond, California, and Mrs. Mehlin reported it to Insurer's office at Berkeley, California (T. 174).

(3) At the time of this accident, Claggett was driving such automobile at Richmond, California, with the permission of Mrs. Mehlin (T. 174).

(4) In the absence of waiver or estoppel on its part, Insurer's omnibus clause required the use of the automobile to be with the permission of its named insured, Mr. Mehlin; otherwise Insurer could deny liability for such accident (T. 33).

Third, on November 7, 1947, Insurer learned these facts:

(1) Its named insured, Wilbur Mehlin, was in Lincoln, Nebraska, Claggett was not personally acquainted with him and that it was physically impossible for Mr. Mehlin to have personally given Claggett permission to use this automobile (T. 196-7); and

(2) Mrs. Mehlin had brought this automobile to and was staying at Richmond, California (T. 193).

Notwithstanding all of its knowledge, for the purpose of defense, Insurer has claimed that it made no inquiry whether Claggett had Mr. Mehlin's permission before it represented to Appellee that Claggett had such required permission (T. 174, 194-197). In view of such circumstances, there was sufficient evidence for the jury to determine that Insurer, as a reasonably prudent person, should have made an inquiry concerning permission from Mr. Mehlin.

4. ACTUAL KNOWLEDGE OF INSURER SHOWN BY EVIDENCE.

On or about April 19, 1948, after learning of a "possible personal liability" on his part, Mr. Mehlin, through attorneys Ginsberg & Ginsberg, under their letter of April 18, 1948, allegedly informed Insurer's attorneys that Mrs. Mehlin did not have permission to use the car or to permit Claggett to use it (T. 102-3, B. xii). Such letter was inadmissible on the issue of permission, *Trotter v. Union Ind.*

Co. (C.C.A. 9th, 1929), 35 F. (2d) 104 and *Fredericksen v. Employers* (C.C.A. 9th, 1928), 26 F. (2d) 76. However, by stipulation its contents was summarized in reference to Dana's affidavit, which was admitted only on the issue of estoppel (T. 100). Such letter did give Insurer written notice of Claggett's alleged lack of permission. Notwithstanding such notice, Insurer continued to permit Appellee to believe its policy covered this accident and to incur the trouble and expense of preparing for the trial of the wrongful death action, and on two occasions within a week to ten days of the trial date of July 7, 1948, Insurer informed Appellee that if Appellee would stipulate to a continuance to the trial date for such action, Insurer would work out a settlement (T. 93); see, *Home Fire Ins. Co. v. Kuhlman* (1899), 58 Neb. 488, 78 N. W. 936, where similar knowledge on the part of the insurer was the basis of a waiver.

5. INTENT OF INSURER TO WAIVE SHOWN BY EVIDENCE OF INSURER'S CONDUCT.

There was sufficient evidence from which the jury could and did find that an intent to waive was implied from Insurer's conduct. The following evidence shows that Insurer treated its policy as a valid and subsisting contract and induced Appellee to act in that belief:

After previously informing Appellee's attorneys that it did not have any policy covering Claggett, on December 3, 1947, Insurer, of its own volition, informed Appellee's attorneys that it had found it was in error and it did have a policy covering this accident (T. 85). All conduct of Insurer thereafter, until July 2, 1948, according to its natural import, was so inconsistent with the intent to enforce any defense of lack

of permission under said policy, as to induce a reasonable belief on the part of Appellee that any such defense was waived.

On December 31, 1947, Gripenstraw reiterated to Appellee's attorneys that its policy covered this accident and stated that Insurer was satisfied Claggett had permission to use the car and offered to settle this case for $7,500.00 (T. 85-87). On January 13 and 22, 1948, he discussed settlement further with Appellee's attorneys, and on January 28, 1948, Hunt reopened settlement discussions and offered up to $8,500.00 in settlement (T. 88-89). On February 5, 1948, Hunt informed Appellee's attorneys that Insurer would turn the case over to its attorneys for defense, and on February 6, 1948, he requested a further extension of time for such purpose and informed them that Dana, Bledsoe & Smith would represent Claggett on its behalf (T. 89, 161). Thereafter, Insurer's attorneys filed an answer for Claggett in such death action and admitted permission from Insurer's named insured (T. 90-91). Insurer's attorneys then arranged for the trial date of July 7, 1948, and had it set for trial on such date (T. 92-93); and within a week to ten days of such trial date, on two occasions, informed Appellee's attorneys that a settlement could be worked out if Appellee would stipulate to a continuance of such trial. What other acts could Insurer have done to show that it was treating such policy as valid and covering this accident?

a. Insurer's conduct not justified by Insurer's alleged failure to inquire of alleged policy defenses.

Before making its representations to Appellee, it was Insurer's duty to inquire of Mr. and Mrs. Mehlin

whether Mrs. Mehlin had such permission (see page 42 hereof setting out the authorities showing Insurer's duty to inquire). Insurer's motive or mistake in making such representations does not preclude a waiver or estoppel, for it was Insurer's duty before undertaking Claggett's defense or negotiating settlement to investigate all facts in connection with the loss, including possible policy defense. In 29 Am. Jur. 672, the Insurer's duty to inquire has been summarized and, in part, states:

> "The general rule supported by the great weight of authority is that if a liability insurer, with knowledge of a ground of forfeiture or noncoverage under the policy, assumes and conducts the defense of an action brought against the insured, without disclaiming liability and giving notice of its reservation of rights, it is thereafter precluded in an action upon the policy from setting up such ground of forfeiture or noncoverage.[5]* The insurer's conduct in this respect operates as an estoppel to later contest an action upon the policy, regardless of the fact that there has been no misrepresentation or concealment of material facts on its part,[6] and notwithstanding the facts may have been within the knowledge of the insured equally as well as within the knowledge of the insurer.[7] The reason which impels the insurer to defend the suit[8] or its good faith in doing so is likewise immaterial.[9] Indeed, the fact that the insurer's conduct may have been due to a mistake of law does not in and of itself prevent such an estoppel of the insurer.[10]
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>
> However, a liability insurer does not, by conducting the defense of a suit against the insured,

*Arabic numerals refer to footnotes.

> waive a ground of forfeiture or noncoverage of which it at that time has no knowledge,[16] especially where, in addition to such lack of knowledge, the insurer is misled by misrepresentations into defending the suit.[17] But if the liability insurer conducts a defense of a suit against the insured after having received information sufficient to put it upon inquiry as to the ground of nonliability which it later seeks to assert against the insured, it will be precluded from disclaiming liability upon such ground.[18] There is also authority to the effect that it is the insurer's duty, before undertaking the defense of the case against the insured, to investigate all the facts in connection with the supposed loss, as well as any possible defense upon the policy.[19]''

In view of Insurer's duty to inquire and such conduct on its part, the evidence was ample for the jury to determine that Insurer intended to waive a policy defense of lack of permission.

6. DETRIMENT TO APPELLEE SHOWN BY EVIDENCE.

Whether Appellee suffered any detriment by reason of Insurer's conduct is a question of fact for the jury. There was sufficient evidence from which the jury could and did find Insurer misled Appellee to her prejudice.

a. Appellee lost right to fairly appraise settlement offers.

Every plaintiff and every insurer has an equal right to determine whether a claim involved should be settled or contested. In making such determination and evaluating a settlement offer, the plaintiff and the insurer is entitled to regard as true, and to rely upon a representation of a material fact by the other. In appraising the settlement value of Appellee's claim,

Appellee and her attorneys were entitled to accept as true, and to rely upon, an express representation made on at least four occasions that Insurer's policy covered this accident and Claggett. The four occasions were as follows:

1. On or about December 3, 1948, adjuster Dennis informed the attorneys for Appellee that Insurer had a policy covering this accident and that Insurer's previous report to the contrary was in error (T. 85);

2. On December 31, 1947, adjuster Gripenstraw stated that Insurer's policy covered this accident, that Claggett had permission to use the car, and that Insurer would pay $7,500.00 in settlement of the claim (T. 85-87);

3. On January 28, 1948, claims superintendent Hunt stated that Insurer would pay up to $8,500.00 in settlement of the claim, and thereafter, when such offer was rejected, stated Insurer was turning the defense of the case over to its attorneys and they would represent Claggett (T. 88-89);

4. On February 17, 1948, Attorney Dana, as the duly authorized representative of Insurer, filed a verified answer on behalf of Claggett, which expressly admitted that Claggett was driving the automobile with the permission of Wilbur Mehlin.

It is the uncontradicted evidence that in appraising the settlement value of this claim, Appellee accepted as true, and relied upon such representations of coverage and permission; further, that if the Insurer had not made such representations, Appellee would have caused an independent investigation to be made concerning Claggett's permission, and weighed each set-

tlement offer in the light of what such investigation disclosed (T. 92).

In Appellee's negotiations with Insurer, there was never any fact which would indicate to Appellee that Insurer had not made an investigation concerning permissive use or that such representations that Claggett had permission were false. An ordinary person would not expect an insurer to make such an offer of $7,500.00-$8,500.00 of its policy limit of $10,000.00 if such representations were false.

b. Appellee incurred trouble and expense of commencing and preparing death action for trial.

As pointed out in *Continental Casualty Co. v. Curtis Publishing Co.* (C.C.A. 3d, 1938), 94 F. (2d) 710, prejudice resulted to Appellee because if an immediate investigation had been made by her, she might have (1) had available testimony of witnesses familiar with the transaction and would have had the full cooperation of Claggett to whose interest it was to prove that he had the necessary permission in order to provide indemnification for himself, and (2) been satisfied from her investigation that there was no permission, and as a result would not have gone to the expense to bring such death action or the action on this policy. See, *Home Fire Ins. Co. v. Kennedy* (1896), 47 Neb. 138, 66 N. W. 278, where the Court held the cost and trouble to perfect a proof of loss was sufficient detriment to an insured to raise a waiver or estoppel against the Insurer.

In this case, Appellee, in good faith, relied upon express representations of Insurer and Insurer's conduct, which induced Appellee to believe this policy

was a valid and subsisting contract covering Claggett, and she, thereby, was trapped into a situation where she lost her right to fairly appraise the settlement value of her claim and incurred the trouble and expense of the death and policy actions.

7. OMNIBUS CLAUSE IS SUBJECT TO WAIVER.

An omnibus clause extends the insurance under an automobile insurance policy to any person driving the insured automobile with the permission of its named insured. The condition which makes such clause applicable is the permission of the named insured, and such condition is subject to waiver or estoppel. Since we have not found any California or Nebraska decision, we cite the following cases, which held that an insurer, by its conduct, waived or was estopped to set up such condition of lack of permission:

Snedker v. Derby Oil Co. (1948), 164 Kan. 640, 192 Pac. 135, at 137;

Va. Automobile Ins. Co. v. Brillhart (1948), 187 Va. 336, 46 S. E. (2d) 377 at 380;

Peterson v. Maloney (1930), 181 Minn. 437, 232 N. W. 790;

Horn v. Commonwealth Casualty Co. (1929), 105 N.J.L. 616, 147 Atl. 483;

Vondepitte v. Preferred Acc. Ins. Co. (1929), 42 B.C. 255, 2 D.L.R. 562.

In *Snedker v. Derby Oil Co.,* supra, the Court stated:

> "In 29 Am. Jur. 672, sec. 878, it is stated: 'The general rule supported by the great weight of authority is that if a liability insurer, with knowledge of a ground of forfeiture or noncoverage under the policy, assumes and conducts the de-

fense of an action brought against the insured, *without disclaiming liability and giving notice of its reservations of rights,* it is thereafter precluded in an action upon the policy from setting up such ground of forfeiture or noncoverage. The insurer's conduct in this respect operates as an estoppel to later contest an action upon the policy, regardless of the facts that there has been no misrepresentation or concealment of material facts on its part, and notwithstanding the facts may have been within the knowledge of the insured equally as well as within the knowledge of the insurer. * * *'' (Italics ours.)

The Court then reviewed the applicable authorities and stated:

"It will be noted that under the general rule a liability insurer which assumes the defense of an action against the insured may save itself from the bar of waiver or estoppel in a subsequent action upon the policy if, in the action against the insured, it clearly disclaims liability under the policy, and gives notice of its reservation of a right to set up the defense of noncoverage. In the case before us the record does not disclose nor is there any contention that the insurance carrier made such a disclaimer of liability, or reserved the right to assert noncoverage in any subsequent action against it.

We proceed to the question whether there was substantial evidence that the insurance carrier (the appellant) did defend Striplin in the damage action. After careful examination of the record, we must conclude that there was ample evidence to support a finding by the jury that the insurance carrier did represent Striplin in the damage action, without disclaimer of liability and without notice of reservation of right to assert noncover-

age under the policy in any action against it. Upon such a finding the jury was required under the instructions to bring in a verdict for the plaintiff."

a. **A new risk not being created.**

At pages 41-50 of its Opening Brief, Insurer contends that if the doctrine of waiver or estoppel is applied, it will create a new risk under the policy. Such contention is without merit in fact as well as in law.

First, the condition of permissive use does not affect the risk borne by the insurance company under this policy.

Second, under the facts in this case, the jury must be deemed to have decided that there was no change or increase in the risk resulting from the alleged breach of the condition of permissive use; and, further, there was no evidence from which a jury could find that there was a change or increase in the risk.

Third, under both Nebraska and California Law, an insurer may waive or be estopped to assert a defense of noncoverage for breach of conditions, even though such breach caused a material increase in the risk.

The risk borne by Insurer under this policy is to pay for the damage or injury occasioned from the operation of this automobile. One of the conditions of the risk is that the automobile be used by the named insured, his spouse residing in his household, or by any person who has the permission of the named insured. There is no limitation whatever upon the number, identity or competency of the persons to whom the named insured may give his permission. As far as the Insurer is concerned, with respect to estimating the

risk involved, the named insured may give his permission to any person old enough to obtain a driver's license, or whether or not he has or is qualified to obtain a driver's license, or whether he is physically or mentally incompetent, or whether he is a careless or reckless driver. No matter how many persons are given permission by the named insured or what their driving ability, the premium charged by Insurer remains unchanged.

In view of the lack of limitations, other than age, concerning the persons who may operate the automobile with the consent of the named insured, the alleged absence of permission to Mr. Claggett (who received permission from the wife rather than directly from the named insured) cannot be regarded as changing the risk borne by Insurer under this policy. Further, there is no evidence from which the jury could have decided that there was a change or increase in the risk. Insurer offered no evidence whatever to show that Mr. Claggett was an incompetent or reckless driver but, on the contrary, offered evidence to show that the accident was caused by the negligence of decedent, Mr. Porter. As far as the evidence shows, Mr. Claggett was at least equally as competent and careful a driver as the named Insured or his wife or any other person who might have the permission of the named Insured. The jury must be deemed to have decided this issue in favor of Appellee.

b. Nebraska has held that an insurer waived or was estopped to assert a defense of noncoverage.

Nebraska has held that an Insurer waived or was estopped to assert a defense of noncoverage where the following policy conditions were breached:

1. Of fire insurance policy against *unoccupancy* of the building for more than ten (10) days prior to the fire,

Home Ins. Co. v. Kuhlman (1899), 58 Neb. 488, 78 N. W. 936;

Home Fire Ins. Co. v. Phelps (1897), 51 Neb. 623, 71 N. W. 303.

2. Of fire insurance policy against a *change of occupancy.*

Hunt v. State Ins. Co. (1902), 66 Neb. 121, 92 N.W. 921—where there was a change of occupancy from an owner residing on the property to a tenant.

3. Failure to pay *premium* before loss,

German Ins. Co. v. Shader (1903), 68 Neb. 1, 93 N. W. 972;

Higgins v. Old Line Ins. Co. (1932), 122 Neb. 254, 240 N. W. 275.

4. Of fire insurance policy requiring Insured to keep books in "iron safe,"

Jensen v. Palatine Ins. Co. (1908), 81 Neb. 523, 116 N. W. 286, at 287.

5. Of provision *prohibiting gasoline* in building,

Home Fire Ins. Co. v. Kennedy (1896), 47 Neb. 138, 66 N. W. 278.

6. Of fire insurance policy against *additional insurance,*

German Mutual Fire Ins. Co. v. Palmer (1902), 3 Neb. 688, 92 N.W. 624.

7. Of fire insurance policy against *encumbrance,*

Hartford Fire Ins. Co. v. Landfare (1902), 63 Neb. 559, 88 N.W. 779.

c. California has held that an insurer waived or was estopped to assert a defense of noncoverage.

California has held that an Insurer waived or was estopped to assert a defense of noncoverage where the following policy conditions were breached:

1. Of *failure to specify a smelter* in fire insurance policy,

Mackintosh v. Agricultural Fire Ins. Co. (1907), 150 Cal. 440, at 447-448, 89 Pac. 102.

2. Of condition *prohibiting gasoline* in home,

Arnold v. American Insurance Co. (1906), 148 Cal. 660, 84 Pac. 182;

Kruger v. Western Fire & Marine Ins. Co. (1887), 72 Cal. 91, 13 Pac. 156.

3. Of failure to pay *premium,*

Farnum v. Phoenix Ins. Co. (1890), 83 Cal. 246, 23 Pac. 869.

4. Of provision in boat insurance policy against *transfer of title,*

Hilton v. Federal Ins. Co. (1931), 118 Cal. App. 495, 5 P. (2d) 648.

5. Of provision in fire policy against *change in location of merchandise,*

Reid v. Northern Assur. Co. (1923), 63 Cal. App. 114, 218 Pac. 290.

See companion case:

Steil v. Sun Insurance Office (1916), 171 Cal. 795, 155 Pac. 72.

It is difficult to see any reasonable distinction between a breach of a condition against change of occupancy, unoccupancy, failure to pay a premium, iron safe clause, transfer of title (encumbrance), change of

location of merchandise, or "prohibited article clause," and a condition of permissive use of an automobile, as each goes equally to the issue of coverage.

Insurer has cited two California cases, *Conner v. Union Auto. Ins. Co.* (1932), 122 Cal. App. 105, 9 P. (2d) 863, involving an express exclusion against trailers, and *Hancock etc. Ins. Co. v. Markowitz* (1944), 62 C. A. (2d) 388, 144 P. (2d) 899, involving a false representation of Insured's physical condition, from which it asks this Court to conclude that the condition of permissive use is not subject to waiver or estoppel. These cases do not warrant such a generalization, as the Court merely held that under the particular facts of each case the evidence did not show an estoppel or waiver. In the *Conner* case, there was no estoppel as the conduct of the Insurer did not mislead or prejudice the insured and there was no waiver, as the Insurer had no information that indicated the Insured intended to use a trailer with his automobile. In the *Markowitz* case, the insured made fraudulent representations to his insurer and one can never involve an estoppel to protect himself from his own fraud.

Likewise, Insurer has cited a Nebraska case, *Card v. Minn. Fire Ins. Co.* (1941), 139 Neb. 602, 298 N. W. 157, which is distinguishable upon the grounds that the seller of the car did not request insurance from his Insurer for its purchaser and the Insurer did not know the purchaser wanted insurance.

Insurer has also cited several Federal cases, *Van Meter v. Franklin Fire Ins. Co.* (C.C.A. 9th 1907), 164 F. (2d) 325; *Fidelity & Guaranty Fire Corp. v. Bilquist* (C.C.A. 9th 1938), 99 F. (2d) 333; *Carnes &*

Co. v. Employers Liability Assur. Corp. (C.C.A. 5th 1939), 101 F. (2d) 739, and *Commercial Standard Ins. Co. v. Robertson* (C.C.A. 6th 1947), 159 F. (2d) 405, which are distinguishable. The *Van Meter* case involved a change of location and the *Bilquist* case a change of occupancy and of location. Each arose on an insurance contract made in Washington. Under the *Tompkins* case, this Court applied the Washington rule that a breach of such provision could not be waived or give rise to an estoppel. In the *Carnes* case, the Sixth Circuit applied the same rule to a breach of a provision against hauling butane. California and Nebraska have held to the contrary in *Reid v. Northern Assur. Co.* (1923), 63 Cal. App. 114, 218 Pac. 290 (change of location of merchandise), *Hunt v. State Ins. Co.* (1902), 66 Neb. 121, 92 N. W. 921 (change of occupancy), *Mackintosh v. Agricultural Fire Ins. Co.* (1907), 150 Cal. 440, at 447-448, 89 Pac. 102 (smelter in building), and *Arnold v. American Insurance Co.* (1906), 148 Cal. 660, 84 Pac. 182 (gasoline in building); *Kruger v. Western Fire & Marine Ins. Co.* (1887), 72 Cal. 91, 13 Pac. 156 (petroleum in building); further, since under the *Tompkins* case the California rules (and the Nebraska rules to the extent California would apply them) apply in this case, neither the Washington nor Louisiana rule should be considered on this appeal. The *Robertson* case only held that under the evidence in such case a waiver or estoppel did not arise.

Nebraska has expressly held that provisions of an insurance policy limiting or avoiding liability are strictly construed against an insurer and liberally in favor of an insured,

Soehner v. Grand Lodge (1905), 74 Neb. 399, 104 N. W. 871;

and California has declared in *Knarston v. Manhattan L. Ins. Co.* (1899), 124 Cal. 74, 77, 56 Pac. 773:

"The law does not like forfeitures and evidence tending to show the waiver of a forfeiture will be looked upon with kindly eyes."

8. NON-WAIVER CLAUSES SUBJECT TO WAIVER AND ESTOPPEL.

A fair statement of the rule that such clauses may be waived is found in 29 *Am. Jur.* 623, as follows:

"The rule, which is most favorable to the insured and, it may be observed, is well supported by authorities, is that policy provisions which limit the power of insurance agents or other representatives of the insurer to waive conditions of the policy or restrict the manner in which waivers may be made do not supersede the recognized principles of the law of waiver and estoppel, and are not conclusive so as to prevent the officers or agents of the insurer through whom it must act in the transaction of its business, and the conduct of its affairs, from binding the insurer by a waiver of a condition or from creating an estoppel against it to assert a breach of condition in avoidance of the policy. In other words, a nonwaiver clause may itself be waived."

Paragraph 8 of Insurer's policy reads as follows:

"8. *Changes.* Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a

part of this policy signed by an executive officer of the company."

At the outset, it should be noted that such clause does not preclude a waiver or estoppel if the company has notice. Under the evidence in this case all the information its agents obtained was reduced to writing and placed in Insurer's file, and Insurer's board, in fixing a reserve for and placing its settlement value on this claim, knew the contents of such file. Certainly, an insurance company cannot blindfold itself to such knowledge and thereby preclude a waiver or estoppel on its part.

Nebraska has repeatedly held that such clauses did not prevent a waiver.

Hartford Fire Ins. Co. v. Landfare (1902), 63 Neb. 559, 88 N. W. 779;

Hunt v. State Insurance Co. (1902), 66 Neb. 121, 92 N. W. 921;

German Insurance Co. v. Shader (1903), 68 Neb. 1, 93 N. W. 972;

German Mutual Fire Ins. Co. v. Palmer (1902), 3 Neb. 688, 92 N. W. 624.

Insurer relies upon *Northern Assur. Co. v. Grand View Bldg. Asso.* (1902), 183 U.S. 308, 46 L. Ed. 213, and *German Insurance Co. v. Heidnuk* (1890), 30 Neb. 288, 46 N. W. 481; *Jensen v. New York Life* (C.C.A. 8th 1932), 59 F. (2d) 957; *Fidelity Mutual Fire Ins. Co. v. Lowe* (1903), 4 Neb. 159, 93 N. W. 749; *McElroy v. Metropolitan Life Ins. Co.* (1909), 84 Neb. 866, 122 N. W. 27; *Card v. Minn. Fire Ins. Co.* (1941), 139 Neb. 602, 298 N. W. 157; *Pickens v. Maryland Casualty Co.* (1942), 141 Neb. 105, 2 N. W. (2d)

593; and *American Fire Ins. Co. v. Landfare* (1898), 56 Neb. 482, 76 N. W. 1068, to support its view that its non-waiver clause is not subject to waiver or estoppel. A reading of these cases shows they do not support Insurer because *Northern Assur. Co. v. Grand View Bldg. Asso.,* supra, and *German Insurance Co. v. Heidnuk,* supra, were rejected in *German Mutual Fire Ins. Co. v. Palmer* (1902), 3 Neb. 688, 92 N. W. 624, where the Supreme Court of Nebraska said:

> "* * * The recent decision of the Supreme Court of the United States in *Northern Assurance Co. v. Grand View Bldg. Ass'n.,* 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 313, is chiefly relied upon in this connection, and that case has been urged upon our attention so persistently of late that it seems proper to state the reasons moving us to adhere to the course of decision long established in this jurisdiction, notwithstanding the great authority of the tribunal which has adopted a different doctrine."

In *Jensen v. New York Life* (C.C.A. 8th 1932), 59 F. (2d) 957, insured actually knew that the agent lacked authority and did not act to his prejudice, and the Court followed *Northern Assurance Co. v. Grand View Bldg. Asso.* (1902), 183 U. S. 308, 46 L. Ed. 213, which Nebraska has expressly rejected in *German Mutual Ins. Co. v. Palmer* (1902), 3 Neb. 688, 92 N.W. 624.

The following cases are distinguishable on their facts:

McElroy v. Metropolitan Ins. Co. (1909), 84 Neb. 866, 122 N. W. 27; question was whether time for payments of premiums was ex-

tended; and Court held evidence was insufficient to show agent had made such extension or that the company had waived its rights; further, in *German Ins. Co. v. Shader* (1903), 68 Neb. 1, 93 N.W. 972, and *Higgins v. Old Line Ins. Co.* (1932), 122 Neb. 254, 240 N. W. 275, a failure to pay a premium was held to be waived;

Pickens v. Maryland Casualty Co. (1942), 141 Neb. 105, 2 N. W. (2d) 593—action on contractor's liability policy, Court held that under the facts, there was no estoppel or waiver, as evidence showed insured knew of the restriction in the policy, failure to read a policy cannot be a basis for estoppel, and insurer did not induce insured to change his position or cause him to rely upon its conduct to his detriment.

It is difficult to understand what comfort Insurer finds in *American Fire Ins. Co. v. Landfare, supra,* and *Fidelity Mutual Fire Ins. v. Lowe, supra,* as in each of those cases a breach of condition was held waived by insurer.

California has repeatedly held that a non-waiver clause is subject to waiver,

Knarston v. Manhattan Life Ins. Co. (1899), 124 Cal. 74, 77, 56 Pac. 773;

Mackintosh v. Agricultural Fire Ins. Co. (1907), 150 Cal. 440, 449, 89 Pac. 102;

Raulet v. Northwestern Natl. Ins. Co. (1910), 157 Cal. 213, 107 Pac. 292;

Grant v. Sun Indemnity Co. (1938), 11 C. (2d) 438, 80 P. (2d) 996;

Reid v. Northern Assur. Co. (1923), 63 Cal. App. 114, 218 Pac. 290.

California has distinguished *Northern Assur. Co. v. Grand View Bldg. Asso.* (1902), 183 U.S. 308, 46 L. Ed. 213 and *Gladding v. California etc. Ins. Co.* (1884), 66 Cal. 6, 4 Pac. 764 and refused to follow them. In *Mackintosh v. Agricultural Fire Ins. Co.* (1907), 150 Cal. 440, at page 449, 89 Pac. 102, it is stated:

> "In *Gladding v. California etc. Ins. Co.*, 66 Cal. 6 (4 Pac. 764), the agent who attempted to waive the conditions was a local agent, and not, as here, a general agent, who, for contractual purposes, impersonated the company itself. The general remarks contained in the opinion in that case cannot be deemed authority, so far as they indicate a lack of power in the general agent to waive such conditions by acts amounting to a new contract or an estoppel, and without indorsement upon or attached to the policy. In *Shuggart v. Lycoming Fire Ins. Co.*, 55 Cal. 408, and *Enos v. Sun Ins. Co.*, 67 Cal. 621 (8 Pac. 379), it was held that a mere local agent was without such authority unless specially empowered. This is the substance of the decision of the supreme court of the United States in *Northern Assur. Co. v. Grand View B. A.*, 183 U.S. 308 (22 Sup. Ct. Rep. 153, 154.)"

and *Hargett v. Gulf Ins. Co.* (1936), 12 C. A. (2d) 449, 55 P. (2d) 1258 is distinguished upon the grounds that the insurer did not do anything to induce insured to rely upon the validity of his policy.

The other Nonwaiver Provision contained in Insurer's policy in Paragraph 2 of Supplemental Agreements, which reads as follows:

"Acts of the Company or its representatives in performing the duties or exercising the rights under this agreement shall not operate to waive the Company's rights nor estop it from asserting any defense under the policy."

Such provision is not applicable for the following reason: Since in this policy such clause immediately follows subparagraphs (a) and (b) of said paragraph 2, the acts referred to in such clause must necessarily relate to the acts specified in said subparagraphs (a) and (b), which precede it and state:

"(a) under coverage A (1) the Company shall

1. defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the Company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the Company;

2. pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the insured in any such suit, all expenses incurred by the Company, all interest accruing after entry of judgment until the Company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the Company's lia-

bility thereon, and expenses incurred by the insured, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident;

(b) the Company shall reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the Company's request." (T. 32-33.)

All that this non-waiver clause provides is that the mere fact the company defends the suit, investigates it, negotiates settlement or makes certain payments shall not constitute a waiver or estoppel. Such enumeration of acts does not state that the company shall have the right to do other acts without incurring a waiver or estoppel, e.g., (1) make a misrepresentation of a material fact of which it had knowledge and induce a third party beneficiary of its policy to believe and rely upon such representation as a true statement of a material fact to her detriment; or (2) with knowledge of a policy defense, make representations and by its conduct recognize its policy as a valid and subsisting contract.

The Nebraska law is well settled that a non-waiver clause shall be strictly construed against the insurer,

German Insurance Co. v. Shader (1903), 68 Neb. 1, 93 N. W. 972.

Certainly, a non-waiver provision should not permit an insurer to make a representation that its policy covers a loss and induce the third party beneficiary to rely upon the validity of such policy; nor should a non-waiver provision permit an insurer to misrepresent its coverage under its policy or a fact material to

its coverage in negotiations for settlement of a claim with knowledge of its policy defense. This clause does not in any way refer to a misrepresentation of a material fact by the Insurer.

It should be observed that *this non-waiver provision is so broad that even the company itself cannot waive it.* As to such a broad non-waiver provision, 29 Am. Jur., at page 624, states:

> "A non-waiver clause may itself be waived. This is especially true where the restriction is so sweeping as to prevent even the highest rank officers of the insurer from affecting a waiver. In such case the restriction is nugatory and defeats itself.", citing 13 L.R.A. (NS) 839, which states the rule as follows:
>
> "2. *Rule that company cannot prohibit itself from waiving.* Where the nonwaiver agreement is so sweeping as to tie the hands of the company itself, it has sometimes been held nugatory. Under this rule, an agent may waive terms and conditions of the policy to the same extent that he could if it had been silent on the subject of waiver."

and cites the following cases in support of such rule:

Long Island Ins. Co. v. Great Western Mfg. Co., 2 Kan. App. 377, 42 N. W. 739;

Wilkins v. State Ins. Co. (1890), 43 Minn. 177, 45 N. W. 1;

Andrus v. Maryland Casualty Co. (1904), 91 Minn. 358, 98 N. W. 200;

Wolf v. Dwelling House Ins. Co. (1898), 75 Mo. App. 337;

Home Ins. Co. v. Gibson (1894), 72 Miss. 58, 17 So. 13;

Farnum v. Phoenix Ins. Co. (1890), 83 Cal. 246, 261, 17 Am. St. Rep. 233, 23 Pac. 869.

And, as pointed out in *Grant v. Sun Indemnity Co.* (1938), 11 C. (2d) 438, 80 P. (2d) 996:

> "It is a well recognized rule, which we conclude is applicable to the special circumstances here, that the insurer may not repudiate the policy, deny all liability and at the same time be permitted to stand on a provision in the policy for its benefit."

9. AUTHORITY TO WAIVE.

A review of the facts of this case shows that Insurer, itself, is the one who made the waiver. Insurer authorized Dennis to make and report the investigation; Insurer's Board, whose duty it is to review such claims, scrutinized Dennis' report and fixed a settlement value on the claim of $8,500.00 to $9,000.00; its authorized claims department then sought to negotiate settlement for $7,500.00 and made representations concerning its investigation; its authorized claims department wrote its so-called "excess coverage" letter admitting its coverage, accepting the defense of the claim; its authorized attorney made a written representation of the necessary permission; and at all times from November 3, 1947 to July 2, 1948, Insurer conducted itself with knowledge of its policy defenses, and its entire course of conduct was carried on by Insurer itself through the only way a corporation can act, namely, its agents.

Insurer did *not* offer any evidence that

1. Mr. Dennis had no authority to make the investigation of this claim in which he gained constructive knowledge of Insurer's policy defense; or

2. Mr. Dennis had no authority to tell Mr. Castro on December 3, 1947, that Insurer did

have a policy covering this accident and that Insurer's earlier report to the contrary was in error; or

3. Insurer's Board of Review had no authority to review this claim in the light of Mr. Dennis' investigation and written reports, or fix the settlement value of $8,500.00 or $9,000.00; or

4. Mr. Gripenstraw had no authority to call on Mr. Castro and discuss the permissive use issue; or

5. Mr. Hunt had no authority to negotiate settlement with Mr. Castro; or

6. Mr. Dana had no authority to file a verified answer on behalf of Mr. Claggett, intentionally admitting permissive use or to later discuss settlement of this claim with Mr. Castro; or

7. Mr. Gibson had no authority to write his inter-office memorandum of February 11, 1948, concerning Mr. Claggett's lack of permission from Wilbur Mehlin; or

8. The "excess coverage" letter admitting coverage and accepting the defense of this claim was not authorized.

How can Insurer, in the face of such evidence concerning the conduct of its agents, now contend that the jury had no basis for finding that such agents were acting within the scope of their employment?

Further, Nebraska has held that an insurer which commits to its agents the inspection of its risks is charged with knowledge of the facts learned by such agent as inspector.

Phoenix Ins. Co. v. Holcomb (1899), 57 Neb. 622, 78 N.W. 300.

10. RESERVATION OF RIGHTS DID NOT CURE WAIVER AND ESTOPPEL.

The waiver and estoppel occurred prior to Insurer's notice of reservation of rights of July 9, 1948, and the execution of the reservation of rights agreement of July 13, 1948. Where a breach of a condition of an insurance policy has once been waived, it is waived for all times and cannot be recalled.

German Ins. Co. v. Shader (1903), 68 Neb. 1, 93 N.W. 972;

Home Fire Ins. Co. v. Kuhlman (1899), 58 Neb. 488, 78 N.W. 936;

Jones v. Maria (1920), 48 Cal. App. 171, 191 Pac. 943;

Kruger v. Western Fire & Marine Ins. Co. (1887), 72 Cal. 91, 94, 13 Pac. 156.

Further, a reservation of rights taken after such waiver has once occurred is immaterial and not binding on the injured party or the Insured.

Empire State Surety Co. v. Pac. Nat. Lumber Co. (C.C.A. 9th, 1912), 200 Fed. 224;

Rieger v. London Guaranty & Acc. Co. (1919), 202 Mo. App. 184, 215 S.W. 920.

At pages 20-22 of its opening brief, Insurer has cited several cases that hold in an action on a policy, in the absence of waiver or estoppel, a breach of the cooperation or notice provisions of an insurance policy is a defense to the Insurer when it shows that it is prejudiced by such breach; otherwise, such breach is not a defense.

Abrams v. American F. & C. Co. (1948), 32 C. (2d) 233, 195 P. (2d) 797.

Such cases do not hold that an insurer's waiver or estoppel may be cured by a subsequent disclaimer of liability or reservation of rights.

11. "PRINCIPALLY GARAGED AND USED" PROVISION NOT VIOLATED.

The evidence shows that Mrs. Mehlin brought this car to California for a visit, and at the time of this accident it had been in California for two weeks. When interviewed by Insurer in Richmond, Mrs. Mehlin gave her mail and home address as her home with Mr. Mehlin in Lincoln, Nebraska. The jury was entitled to find from such evidence that the car was still "principally garaged and used" at Lincoln, Nebraska, and that Mrs. Mehlin was on a temporary trip in California.

a. Uncertainty of such provision makes it unenforceable.

Nebraska has not passed on these provisions of

Insurer's policy:

"Declaration 1.

The automobile(s) will be principally garaged and used in the above town, county and state (T. 51).

Condition 1.

Policy Period, Territory, Purposes of Use. This policy applies only to accidents which occur and to direct and accidental losses to the automobile which are sustained during the policy period, while the automobile is within the United States of America, its territories or possessions, Canada or Newfoundland, or is being transported between ports thereof, and is owned, maintained and used for the purposes stated as applicable thereto in the declarations" (T. 38).

However, *Sutton v. Hawkeye Casualty Co.* (C.C.A. 6th, 1943), 138 F. (2d) 781 has construed the identical provisions as too uncertain to enforce, stating at page 785:

> "Not alone, however, to the contention that the use of the vehicle actually complied with the claimed promissory warranty, but also to the requirement that clauses of warranty, condition, exclusion, and forfeiture, be certain and explicit, is the adoption of the phrase, 'principally used,' relevant. 'Principally' is a vague, indefinite, uncertain term. Here it is sought, by the use of that term, to limit the use of the automobile to a specified locality, while at the same time, the parties, without qualification, expressly authorized its use during the period of a year, anywhere in Canada or the United States.
>
> Whether the statement under the heading of 'Warranties' be considered a promissory warranty or a condition, the uncertain language must be construed strictly against the insurer and liberally in favor of the assured, to effect the insurance. Furthermore, in determining whether the statement be a promissory warranty or merely an expression of expectation on the part of the assured, a like construction is indulged against the insurer to avoid a forfeiture. If insurance companies wish to exact from insured persons, warranties and agreements as conditions to a valid contract, the terms of the policy to that effect must be so clear as to exclude any other conclusion. See *Moulor v. American Life Ins. Co.,* 111 U. S. 335, 341, 4 S. Ct. 466, 28 L. Ed. 447.
>
> The statement that the automobile would be principally used in Kalamazoo could, by itself, be understood as a statement of expectation, as fairly as an undertaking that the owner bound

himself to such a use, under penalty of having the policy considered void. The provisions of forfeiture were not sufficiently explicit; and clauses of forfeiture in an insurance contract must be explicit. *Residence Fire Ins. Co. v. Hannawold,* 37 Mich. 103. Certainly, the intent of the parties, as gathered from the language of the policy, with regard to this provision, is not so clear as to exclude the conclusion that it was stated as an expression of intention on the part of the assured, and that it was not intended that the policy should be void as a result of change of residence and use of the car elsewhere. Liberally construed with the other provisions, in favor of the assured, the statement in question is to be interpreted as merely a representation of intention on the part of the owner, rather than as a warranty, condition, or agreement.

The indefinite phrasing of the statement relied upon as a condition of the contract, when considered in connection with the broad coverage of the policy, its susceptibility of different interpretations, and the requirement that the language be construed to effect the insurance unless it is so clear as to preclude any other construction, likewise commands a construction in favor of the assured against forfeiture."

Likewise, Insurer's policy does not state "Declaration (1)" is a warranty or that a change in garaging or use will void its policy. The California cases cited by Insurer are distinguishable, as follows:

Purcell v. Pacific Automobile Ins. Co. (1937), 19 C. A. (2d) 230, 64 P. (2d) 1114—it was an express warranty in policy which made policy void; further, during term of policy

vehicle was never garaged at warranted location;

Kindred v. Pacific Auto. Ins. Co. (1938), 10 C. (2d) 463, 75 P. (2d) 69—same policy provisions as *Purcell* case and truck used continuously outside warranted location;

C.I.T. Corp. v. American Cent. Ins. Co. (1937), 18 C. A. (2d) 673, 64 P. (2d) 742—likewise, express warranty and evidence offered that rate at place where used was 10 times greater than at warranted location. In case at bar, insurer offered no evidence of any change in rate for its policy.

b. Waiver and estoppel preclude Insurer's right to assert such defense.

Insurer has waived this provision of its policy. Within a few days after this accident, Insurer had actual knowledge of where the automobile was being used and for what period, and all its conduct for eight months thereafter was inconsistent with any claim of such policy defense on its part, and such conduct induced Appellee to believe Insurer recognized its policy as a valid and subsisting contract with Claggett and Appellee, *Hartford Fire Ins. Co. v. Landfare* (1902), 63 Neb. 559, 88 N. W. 779; and, since such conduct has prejudiced Appellee, it would also constitute an estoppel.

IV.

CONCLUSION.

A review of the record shows that there is substantial evidence to support the verdict of the jury (1) that Claggett had the implied permission of Insurer's named insured to use the automobile at the time of this accident; (2) that the place where the automobile was to be "principally garaged and used" was not changed, contrary to the provisions of said policy; (3) that Insurer had constructive knowledge of such alleged defense of lack of permission or violation of its provision covering the place where the automobile was "principally garaged and used" and that the conduct of Insurer was such as to warrant an inference of its intention to waive its right to such alleged defenses; and (4) that the conduct and representations of Insurer misled Appellee and Appellee, in reliance upon such conduct and representations, acted to their detriment, and, therefore, Insurer is estopped to assert its alleged defenses.

It is respectfully submitted that for the foregoing reasons the judgment for Appellee and the order of the trial court denying Insurer's motion for a directed verdict and a judgment *non obstante veredicto* should be affirmed.

Dated, San Francisco, California,
August 18, 1950.

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